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ALEXANDER L. STEVAS,
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No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

v.

WILLIAM R. LUCAS,
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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J. PAUL MCGRATH
Asst. Attorney General

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1981
CERTIORARI GRANTED JUNE 28, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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The United States Court Of Appeals
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JOINT APPENDIX

RELEVANT DOCKET ENTRIES

In The United States District Court For The Northern District Of Alabama

Date	Proceedings
July 9, 1976	Petition for Removal of this cause from Madison Cir. Ct., Their #76-6-696, to this Court, with copy of original summons/complaint attached - filed
July 9, 1976	Notice by deft. Of Filing Petition For Removal - filed - cs
Sept. 3, 1976	Motion of deft., To Dismiss or in the alt. Summary Judgment - filed - cs see 2/7/77 order

Sept. 27, 1976	Response by plff to defendant's motion for summary judgment and motion for continuance or other relief under Subdivision (f) of Rule 56 of FRCP, filed, cs
Sept. 28, 1976	Order, in consideration that pltf's. interrog. are unduly burdensome for purpose of the pending s/j motion, striking same ex mero motu both & directing that pltf. may take deft's. deposition, with restraint that pltf's. examination be concluded within 3 hrs., subject to deft's. answers being responsive & straight forward filed & entered (Pointer) - cm
Nov. 2, 1976	Deposition of Dr. Wlm. R. Lucas taken on behalf of pltf. on 10/20/76 filed C. Frank McMillan, rptr.
Nov. 3, 1976	Response (Supplemental) of pltf. To Motion For Summary Judgment by deft. - filed - cs lrc
Nov. 3, 1976	Affidavit of Leslie W. Ball - filed lrc
Dec. 14, 1976	Affidavits of Elmer S. Groo, James T. Shepherd & Joseph M. Jones in support of motion for summary judgment - filed - cs lrc dated 2/4/77
Feb. 7, 1976	Order, dated 2/4/77, that there being no genuine issues as to any material fact, granting summary judgment in favor of deft.; taxing costs against pltf. - filed & entered (Pointer) - cm lrc

In The United States Court Of Appeals, For The Fifth Circuit

[July 12, 1979	Judgment Affirming District Court judgment, w/opinion]
Oct. 4, 1979	Order denying rehearing en banc [,] w/o poll
Oct. 1, 1980	Supplemental brief for appellant
Oct. 8, 1980	Supplemental brief for appellee
June 12, 1981	[On remand, judgment reaffirming original decision of this court and affirming judgment of district court, w/opinion]

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

Civil Action No. 76-6-696

William C. Bush,
Plaintiff,

v.

William R. Lucas,
Defendant.

SUMMONS

To any Sheriff or any other person authorized by Rule 4(a) (3) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama:

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendant William R. Lucas, 6805 Criner Road, S. E., Huntsville, Alabama, or, if your deputy can gain admittance at MSFC, at Building 4200, George C. Marshall Space Flight Center.

Each defendant is required to serve a copy of a written answer to the complaint upon Harvey Elrod, attorney of record for the plaintiff, whose address is P. O. Box 632, Decatur, Alabama 35602, within thirty (30) days after service of this summons, excluding the day of service of the summons, and to file the original of such written answer with the Clerk of this Court at the time of service of the answer upon the attorney of record for the plaintiff or within a reasonable time thereafter. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief demanded in the complaint.

Dated this the _____ day
of _____, 1976.

_____

Clerk of Court

IN THE CIRCUIT COURT FOR MADISON COUNTY, ALABAMA

_____

[Title Omitted In Printing]

COMPLAINT

[Counts One Through Three Omitted In Printing.]

Count Four

1. Plaintiff now is and for a number of years has been an aerospace engineer in the civil service of the United States of America. For several years, he has been employed at Marshall Space Flight Center.

2. Between the dates of 1 May 1975 and 25 November 1975, defendant, while purporting to act in his official capacity as Director of the George C. Marshall Space Flight Center, con-

spired with divers persons, including among others, one John S. Potate, one Gustav Albert Knoll, one Ronald K. Olsen, one Miles J. Miniter, one Robert G. Eudy and one J. E. Kingsbury, both to deprive plaintiff of his constitutional rights of freedom of speech and of petition to Congress and to reduce plaintiff two General Schedule grades in the civil service, with attendant reduction in salary of approximately Ten Thousand Dollars ($10,000.00) a year.

2. Such conspiracy was entered into and pursued with the common intent of stifling fair comment by plaintiff, and others similarly situated, upon wasteful personnel and management practices at George C. Marshall Space Flight Center, all to the end that the defendant and his co-conspirators might continue their wasteful practices at George C. Marshall Space Flight Center without ever having to account for the same.

3. The said conspiracy was entered into either at George C. Marshall Space Flight Center or at some one or more other places within the territorial confines of Madison County, Alabama. It was carried into execution at George C. Marshall Space Flight Center.

4. In pursuance of the said conspiracy, defendant or one or more of his co-conspirators caused a specious investigation to be made among certain personnel who were co-employees of plaintiff at the said George C. Marshall Space Flight Center; the defendant, or one or more of his co-conspirators, caused the said specious "investigation" to be made for the alleged purpose of independently ascertaining whether plaintiff's position was, as he then and has since contended, substantively meaningless and of no benefit to the taxpayers of the United States of America, but plaintiff is informed and believes that the said so-called investigation was in truth and in fact conceived and executed for the purpose of concocting charges upon which plaintiff might be demoted with colorable justification; that, after

such alleged "investigation," defendant or one or more of his co-conspirators caused the co-conspirator Kingsbury formally to give plaintiff notice of the proposed removal of plaintiff from the civil service on charges concocted by one or more of the co-conspirators, acting always in concert with or at the instance or procurement of defendant; that, after the said notice was given plaintiff, defendant and one or more of his co-conspirators sought to frustrate, nullify and render meaningless the rights accorded plaintiff under §14 of the Veterans' Preference Act, as amended (5 U.S.C.A. §7512) by providing defendant as the officer to whom plaintiff's oral and personal reply to the charges would be delivered and who would make the decision as to whether the charges were sustained; that, pursuant to the said conspiracy, defendant, while finding that certain of the more extravagant of the charges were not sustained, did find that certain of the said charges were sustained, and did demote plaintiff two General Schedule grades; that, in the ensuing and yet pending course of appeal to the United States Civil Service Commission, defendant and one or more of his co-conspirators have sought to hamstring plaintiff in and about his efforts to prosecute the said appeal; and that, as a direct and proximate result and consequence of the said conspiracy, plaintiff already has been deprived of several thousand dollars of salary to which he was entitled if defendant and his co-conspirators had given plaintiff meaningful work rather than demoting him for asking for meaningful work, and plaintiff further has been put to great expense by way of legal fees and other expenses and outlays necessarily incurred by him in attempting to obtain redress through administrative channels.

5. Plaintiff has set forth the preceding Paragraph 4 by way of inducement merely; he does not invoke, or seek to invoke, the jurisdiction of this state court for purposes of obtaining reinstatement or other remedies available to him either through appeal to the Civil Service Commission or by ultimate resort to

the United States courts. He does invoke the jurisdiction this court, which he is advised is concurrent, as to such subject matter, with that of the United States District Court for the Northern District of Alabama, for purposes of obtaining redress for the tort committed by defendant and his co-conspirators in initially violating rights under the First Amendment to the Constitution of the United States of America.

6. Said violations have consisted in the efforts of defendant and his co-conspirators, in pursuance of their aforesaid common intent of continuing waste of public funds and forces, without accounting therefor, to squelch plaintiff in his letting members of Congress, members of the press and some few members of the public know of the waste which he observed to be rampant at Marshall Space Flight Center. For having so expressed himself, plaintiff has been punished by defendant and his co-conspirators by being demoted as aforesaid and by being denounced as, in effect, a liar in advance of any hearing upon the charges ultimately made against plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of ONE MILLION DOLLARS ($1,000,000.00) and costs.

/s/ Harvey Elrod
P. O. Box 632
Decatur, Ala. 35602
(Tel. No. [205] 355-3731)
Attorney for plaintiff

HUTSON, ELROD, EDWARDS
& BELSER
140 Citizens Industrial Bank
Bldg., P. O. Box 632
Decatur, Alabama 35602

[Service directions omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

• • •

Civil Act No.: CA 76 P0962NE

[Title Omitted In Printing.]

PETITION FOR REMOVAL OF A CIVIL ACTION

Petitioner, William R. Lucas, by his attorney, the United States Attorney for the Northern District of Alabama, respectfully petitions the Court as follows:

1. Petitioner is the defendant in the Civil Action now pending in the Circuit Court of Madison County, in the State of Alabama, No. 76-6-696 entitled

WILLIAM C. BUSH,
Plaintiff,

vs.

WILLIAM R. LUCAS,
Defendant,

and that trial has not yet been had therein.

2. That the above-entitled action was commenced against the petitioner on June 24, 1976, by service of process and a copy of the Complaint on the petitioner on July 2, 1976. Copies of all process and pleadings served on petitioner are attached hereto as Exhibits A and B.

3. This Petition for Removal is brought pursuant to 28 U.S.C. 1442(a)(1) and 1446, said action in the State Court commenced against petitioner being a civil action in connection with acts allegedly done by him under color of his office as the Director of George C. Marshall Space Flight Center, National Aeronautics and Space Administration.

4. The petitioner's actions arose from the performance of the official duties of the petitioner's aforesaid office in that on June 25, 1975, a press conference in the commemoration of the Marshall Space Flight Center's fifteenth anniversary was held in the Center's headquarters building, Huntsville, Alabama. At the conclusion of said press conference, the petitioner, in response to a question posed by a Huntsville television station reporter, replied to the query concerning certain allegations made by the plaintiff publicly that said public utterances of the plaintiff after investigation of same were without a basis in fact. The comments of the petitioner were made at an official press conference by the Director of the Marshall Space Flight Center in his capacity as said Director and completely within the scope of his employment.

5. Petitioner files herewith a bond of good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that this case was not removable or was improperly removed.

WHEREFORE, this action, now pending in the Circuit Court of Madison County, is properly removed therefrom to the Court, pursuant to 28 U.S.C. 1442(a)(1).

WAYMAN G. SHERRER
United States Attorney

BY: /s/ HENRY I. FROHSIN
Assistant United States
Attorney

Verification

The undersigned Assistant United States Attorney for the Northern District of Alabama, pursuant to the provisions of 28 U.S.C. 1446(a) and by virtue of the authority vested in him by the Attorney General of the United States, hereby verifies that he has read the foregoing Petition and the attachments thereto, and upon the basis of the information now available to him with respect to the incident referred to therein, he is of the opinion that the petitioner, at the time alleged in the Complaint, was an officer of the United States acting under color of his office and thereby within the provisions of 28 U.S.C. 1442(a)(1).

DATED: this 8th day of July, 1976.

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

Subscribed and sworn to before
me on this 8th day of July, 1976.

/s/ Sue M. Elliott
NOTARY PUBLIC

My Commission expires: 8-13-79

[Certificate of Service omitted in printing.]

[Exhibits A and B to the Petition for Removal were copies of the summons and complaint set out at pp. 3-7, ante., in accordance with Rule 30.1.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

NOTICE OF FILING OF PETITION FOR REMOVAL OF A CIVIL ACTION

TO: Harvey Elrod, Esq.
Hutson, Elrod, Edwards & Belser
Attorneys for the Plaintiff

Please take notice that on July 9, 1976, William R. Lucas filed with the Clerk of the United States District Court for the Northern District of Alabama a Petition for Removal of the above-entitled action. A copy of said Petition and Removal Bond is attached hereto.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

[Certificate of Service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Comes now the defendant, Dr. William R. Lucas, by and through his attorneys, and moves to dismiss the complaint filed heretofore in the above-styled cause, or in the alternative, for summary judgment; and as grounds therefor, says:

1. The complaint fails to state a claim upon which relief can be granted.

2. Based upon the affidavits of Dr. William R. Lucas, and Elmer S. Groo, attached hereto and incorporated by reference, it affirmatively appears that the defendant was acting at all times, made the subject of the complaint herein, in an official capacity as Director of the National Aeronautics and Space Administration, George C. Marshall Space Flight Center, and thereby is protected by the "Doctrine of Official Immunity." *Barr* v. *Mateo [sic],* 360 U.S. 564.

3. The communications made the subject of the complaint were "within the outer perimeter" of the defendant's duties and are, thereby, absolutely privileged. *Barr* v. *Mateo [sic], Supra.*

4. Based upon the aforesaid affidavits and the pleadings herein, there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law.

WHEREFORE, the defendant respectfully prays for an order dismissing the complaint with prejudice, or in the alternative,

for summary judgment, together with costs and any further and different relief as the Court deems just and proper.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
First Assistant U.S. Attorney

[Certificate of Service omitted in printing.]

AFFIDAVIT
OF
WILLIAM R. LUCAS

I, WILLIAM R. LUCAS, residing at 6805 Criner Road, S. E., Huntsville, Alabama, am Director of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center located near Huntsville in north Alabama.

I have read and am familiar with allegations contained in the complaint in Civil Action No. 76-6-696, which was filed by Mr. William C. Bush in the Circuit Court for Madison County, Alabama, on June 24, 1976, and which names me as defendant.

My official duties, both now and at all times covered by the events alleged in the Bush complaint, make me "totally responsible for all facets of the Center's operations." I am also "charged with the responsibility for the success of those missions and programs assigned" to the Center; and I am "authorized to take such action as is necessary to carry out this responsibility." A copy of my official job description is attached.

In an article which appeared in the *Huntsville Times* on May 15, 1975, Mr. Bush, an individual employed as a GS-14 engineer

at the Marshall Space Flight Center, was quoted as having made statements highly critical of the Center. Among other things, he was quoted as having said that his job description was written improperly "to support the GS-15 branch chief," and was a "falsehood, a travesty and worthless"; and that he was reporting what "appears to be a fraudulent use of Federal funds." That article was the basis for a May 17, 1976, National Press Release which appeared in a number of newspapers in various parts of the country. Mr. Bush also appeared on local Huntsville television on May 15, June 10, and June 29, 1975, where he made additional allegations critical of the Center. On one or more of those occasions, Mr. Bush's comments included some to the effect that he did not have enough meaningful work to keep him busy; that he spent no more than thirty minutes to an hour each day on official work; and that his job was unnecessary and should be abolished to save the taxpayers' money.

As Center Director, I was greatly disturbed by these allegations, as well as the fact that they came to my attention initially through newspaper articles and television broadcasts. Consequently, I took the following action: First, I asked my subordinate managers with cognizance over Mr. Bush's function to look into the matter and report to me; Secondly, I requested that an independent investigation into Mr. Bush's allegations be conducted by the NASA Inspections Division.

As a result of both investigations, I was assured that Mr. Bush did have a valid job description; that the function for which he was responsible was necessary to fulfill the Center's missions; that he did have enough meaningful work to keep him busy; and that, in fact, he had been putting in a reasonable day's work.

On June 25, 1975, a press conference in commemoration of the Marshall Space Flight Center's fifteenth anniversary was held in the Tenth Floor Conference Room of Building 4200 (the Center's Headquarters' Building). At the end of that press con-

ference, I was interviewed by a reporter from Huntsville Television Station WHNT-TV, who asked me several questions concerning Mr. Bush's public allegations. Based upon the assurances I had received from the above-mentioned investigations, I responded that, as to Mr. Bush's statement to the effect that he had no meaningful work to do, I had had that statement investigated and that "I can say unequivocally that such a statement has no basis in fact."

My comment was made at an official press conference held at the Marshall Space Flight Center where I appeared as Director of the Center, and involved a matter completely within the scope of my employment as Center Director. I believed the statement to be true when I made it, and I still believe it is true. I bore Mr. Bush no malice at that time, and still feel none toward him. In making the statement my sole intention was, on behalf of the Center, to set the record straight. There was no intent to "defame" Mr. Bush.

Because of Mr. Bush's many public remarks which were misleading and often false, and which brought discredit to the Government service, he was notified by letter dated August 1, 1975, from Mr. James E. Kingsbury, Director of the Center's Science and Engineering Directorate, of a proposed adverse action to remove him from Center employment. As Center Director, I later considered that proposed adverse action; determined that some of the reasons specified in reasons which were sustained were sufficient to warrant Mr. Bush's removal in order to promote the efficiency of the service. However, because this was Mr. Bush's first offense of record, I decided to reduce the penalty to a reduction-in-grade from GS-14 to GS-12, and to transfer him to another Center organization. I notified Mr. Bush of this decision by letter dated November 25, 1975. Mr. Bush appealed that decision to, and has been accorded a hearing on his appeal by, the United States Civil Service Commission. The Commission's decision on that appeal is pending.

As Director of the Marshall Space Flight Center, I have never "conspired with" anyone to perform any illegal or improper act or to accomplish any illegal or improper end, and certainly not to deprive Mr. Bush, or any other employee, of any freedom or right, or to stifle any "fair comment." However, I do firmly believe that Mr. Bush — as well as any other Center employee, including me — should be held responsible for false and misleading statements which tend to bring discredit upon the Government service.

The investigations I caused to be made into Mr. Bush's allegations, my consideration of the proposed adverse action against him, and my decision to reduce his penalty from removal to reduction-in-grade, were all undertaken in my official capacity as Director of the Marshall Space Flight Center and were fully within the scope of my employment as Center Director.

In conclusion, my allegedly defamatory statement which is the basis of Counts 1, 2 and 3 of the Bush complaint, as well as my actions complained of in Count 4, were made entirely within the scope of my official duties as Director of the Marshall Space Flight Center. Contrary to the Bush complaint, my statement is true to the best of my knowledge and belief, and that statement was made and all my actions were taken in complete good faith rather than for reasons of malice.

/s/ WILLIAM R. LUCAS

COUNTY OF MADISON
STATE OF ALABAMA

Before me, Dorothy J. Davis, Notary Public for the State of Alabama at large, appeared William R. Lucas, who is known to me, and who being first duly sworn, declares that the foregoing statement is true and correct to the best of his knowledge and belief on this 29th day of June, 1976.

/s/ DOROTHY J. DAVIS
Notary Public
State of Alabama at Large

My Commission expires Jan. 3, 1977

---

* * * * * * * *

POSITION DESCRIPTION

* * * * * * * *

2. Official headquarters: Huntsville Ala.

* * * * * * * *

4. Agency position No.: PL-313/(PL-V-012).

5. C.S.C. Classification No.: PL-V-012

6. Date of Certification: 7-3-74

7. Date received from C.S.C.: 7-17-74

8. Classification Action

* * * * * * * *

Class Title of Position: AST-Executive Management Director, NASA George C. Marshall Space Flight Center.

Class, Service: GS; Series: 801; Grade PL-313

* * * * * * * *

9. Organizational title of position: Director

10. Name of employee: William R. Lucas

11. Department, agency, or establishment: National Aeronautics & Space Admin.

a. First subdivision: Associate Administrator for Center Operations.

b. Second subdivision: George C. Marshall Space Flight Center.

* * * * * * * *

13. This is a complete and accurate description of the duties and responsibilities of this position:

George M. Low (signed) June 19, 1974

* * * * * * * *

Title: Associate Administrator for Center operations.

* * * * * * * *

15. Certification by department, agency or establishment:

Lyle A. Metcalfe (signed) June 21, 1974

Title: Director of Personnel, NASA.

16. Description of duties and responsibilities:

Summary

This position serves as Director of the George C. Marshall Space Flight Center (MSFC) in Huntsville, Alabama. MSFC is one of the major NASA field centers and is charged with the responsibility for research, development and advanced study programs associated with large launch vehicles, space transportation systems and selected payloads, together with the related support equipment and facilities. The center is made up of approximately 4,500 employees of which approximately one-third are scientific and professional personnel. The center has significant satellite facilities in the Michoud Assembly Facility at New Orleans. [Phrase deleted in original.] The Director is totally responsible for all facets of the center's operations and is charged

with the responsibility for the success of those missions and programs assigned. He is authorized to take such action as is necessary to carry out this responsibility.

Reports to the NASA Associate Administrator for Center Operations, who establishes specific accountability relationships. The Center Director is subject to such broad and overall guidance as laws, regulations and general NASA policy guidance.

Within this general area of assignment, the Center Director performs the following duties:

1. Formulates center policies and programs, and executes the Agency policies and programs assigned to the center by the National Aeronautics and Space Administration.

    a. Plans and prosecutes the research and development program established by NASA for the center.

    b. Reviews the field of space science, considers the constantly changing goals and requirements of space flight and research, and makes recommendations as to additional programs for the center.

    c. Contacts the Headquarters program directors and the Associate Administrator and other NASA Headquarters staff explaining projects and programs proposed in the center in detail and making recommendations with respect to approving or rejecting proposals initiated outside the center.

    d. Directs liaison work with the technical committee and sub-committees, exchanges ideas and information with representatives from other centers, representatives of private industry and the military services.

    e. Approves or disapproves proposed methods of achieving research and development objectives, re-

quiring outstanding ability to evaluate proposed research and development projects and investigations through an understanding on the highest scientific level, of research and development projects being performed or proposed. Frequently such projects are not only unprecedented, but are unique within the total area of space flight vehicle research and development.

f. Upon receipt of broad program authorization from NASA Headquarters, directs the planning of research and development program, taking into consideration the recommendations of the directors of the technical and program elements of MSFC. Assigns projects to appropriate organizational element directors, basing determination of assignment upon nature of project and particular fields of research and development for which each is responsible.

2. Serves as a consultant and advisor to top echelon government officials on all phases of research and development of long range missiles and space vehicles. The program success involves continual study and exploration into the frontiers of several fields of physical science including physiochemistry, metallurgy, physics and electronics. The incumbent's recommendations and advice in these fields are eagerly sought and accepted not only by his associates and subordinates but by industrial and government scientists and executives engaged in similar activities.

3. Establishes the basic organization of the center required to administer, serve and meet the requirements of the research and development program. Directs, supervises and coordinates the efforts of the major organizational directors in the various technical projects and programs of the center.

4. Represents the Marshall Space Flight Center and NASA in conferences with representatives of the military service, other Government agencies, private industry, universities, research institutions, and professional societies. As Center Director represents the National Aeronautics and Space Administration to community leaders in the geographic areas in which the center operates. Accepts speaking engagements and encourages staff members in this regard.

5. Performs the foregoing duties in conjunction with, and pursuant to the objectives of, the attached functional assignments of the major organizational elements of the Marshall Space Flight Center.

AFFIDAVIT
OF
ELMER S. GROO

I, ELMER S. GROO, am Associate Administrator for Center Operations, National Aeronautics and Space Administration.

I have read and am familiar with allegations contained in the complaint in Civil Action No. 76-6-696, which was filed by Mr. William C. Bush in the Circuit Court for Madison County, Alabama, on June 24, 1976, and which names Dr. William R. Lucas as defendant. I have also read and am familiar with the Affidavit signed by Dr. Lucas which he proposes to submit to the Department of Justice with a letter requesting that the Department represent him in this lawsuit.

My official duties, both now and at all times covered by the events alleged in the Bush complaint, make me the supervisor of Dr. Lucas. I am aware of the statement made by Dr. Lucas to a television news reporter on June 25, 1975, concerning allegations previously made by Mr. Bush. In accordance with Dr. Lucas' official job description, and with specific reference to

NASA Policy Directive 1380.4, that statement was clearly made within the scope of Dr. Lucas' official employment as Director of the Marshall Space Flight Center.

Mr. Bush's public allegations about improprieties at the Marshall Space Flight Center covered matters within Dr. Lucas' jurisdiction as Center Director; and his causing investigations to be made into those allegations was clearly within his scope of employment.

Furthermore, I have no reason to question Dr. Lucas' statement that all his alleged actions which form the basis of the Bush complaint were taken in good faith rather than for reasons of malice.

/s/ ELMER S. GROO

Sworn to and subscribed before me this 30th day of June 1976.

/s/ Dorothy J. Jackson
Notary Public

My commission expires: January 31, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * * *

[Title Omitted In Printing.]

PLAINTIFF'S CONSOLIDATED: (1) INTERIM RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND (2) MOTION FOR CONTINUANCE OR OTHER RELIEF UNDER SUB-DIVISION (f) OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A.

For interim response to the summary-judgment aspect of that certain alternative motion to dismiss or for summary judgment lately served by the defendant in the above-entitled action, plaintiff says as follows:

1. Pared to admissible form, the defendant's moving papers do not disclose that the defendant is entitled to a judgment as a matter of law.

* * * * * * * *

3. The defendant's moving papers do not disclose any factual basis for a threshold determination, as a matter of law, that the defendant did not engage in the wrongdoing averred in Count Four of the complaint.

4. As to the wrongdoing averred in Count Four of the complaint, defendant's motion for summary judgment and accompanying affidavits proffer only generalized denials of wrongdoing.

5. Except for conclusions and argumentative assertions of partisan affiants, defendant's moving papers do not disclose

that, as of the time of the wrongdoing averred in the several counts of the complaint in this action, the defendant was in fact engaged in the performance of any official duty.

* * * * * * * *

7. To grant defendant's motion for summary judgment in the present posture of the above-entitled action would be to foreclose all inquiry into the matter of malice on defendant's part even though no factually sufficient basis had been established for a determination or finding that, in and about the doing of the acts complained of, defendant enjoyed any absolute immunity.

8. In and by his affidavit in support of his motion for summary judgment, defendant denies malice and yet would have the court foreclose any further inquiry on the basis of such ex cathedra denial alone.

9. Defendant's moving papers do not afford sufficient factual basis for *either:* (a) a determination that, as of the time of his acts complained of in this action, the defendant was the incumbent of a position within the protection of the doctrine enunciated by a plurality of the sitting justices in *Barr* v. *Matteo,* the case referred to in the body of defendant's said motion; *or,* (b), a determination that, if the defendant was the incumbent of such a position, he was engaged in the discharge of the duties of such position at the time of the mentioned acts on his part; *or* (c), a determination that the circumstances under which the acts were done were sufficient to render those acts part of any official duty on defendant's part.

10. To grant defendant's motion for summary judgment at this juncture would forestall inquiry into defendant's state of mind without any sufficient factual showing that his position or office was such, at the time of the acts giving rise to the present claims, as to render his state of mind immaterial to the proper disposition of the claims.

11. The affidavits of defendant and of his supervisor Groo, together, do not set forth facts, as distinguished from conclusions and argument, sufficient to show that defendant's duties were such so to confer absolute immunity upon him with respect to the subject matter of the present suit; and the defendant's position description, referred to by both affiants in support of defendant's motion, is itself both quite general and the work of one or more experts as to whose qualifications defendant vouchsafes no information.

12. As more fully appears by the affidavits, interrogatories, copies of documents and copies of correspondence accompanying this interim response, plaintiff challenges the credibility of defendant's affiants and defendant's position record alike.

13. The defendant did not attach a copy of NASA Policy Directive 1380.4, referred to by the affiant Groo, to the copy of defendant's alternative motion served upon counsel for plaintiff.

14. Defendant's moving papers do not disclose that there is no genuine issue as to any material fact.

15. For the reasons hereinabove and hereinafter set forth, defendant's motion for summary judgment is, at best, premature if not, at worst, sham and contumelious.

B.

As more fully appears from the attached affidavits, respectively marked Exhibit "A" and Exhibit "B" hereto and herewith incorporated herein the same as though fully set out herein, plaintiff can not yet present by affidavit certain of the facts essential to a full justification of plaintiff's opposition to defendant's pending motion for summary judgment, assuming that the motion neither falls of its, and its accompanying affidavits', own weight nor floats off for lack of weight.

WHEREFORE, plaintiff moves the court, mainly in the alternative, as follows: (a) presently to deny defendant's motion for summary judgment; or, (b), to order a continuance of the hearing on the said motion pending plaintiff's completion of the course of discovery already commenced in and by those certain interrogatories copies of which, as transmitted to counsel for defendant and to the clerk, appear as Exhibits "C" and "D" to this consolidated response and motion; or (c), make such other order as, in the premises, is just; but, (d), in any event, to grant plaintiff leave to continue the course of discovery commenced in and by the said interrogatories and proposed to be expanded in the light of the answers to the same.

/s/ Harvey Elrod
P. O. Box 632
Decatur, AL 35602
(Tel. No. (205) 355-3731)
Attorney for plaintiff

HUTSON, ELROD, EDWARDS & BELSER
140 Citizens Industrial Bank Building
205 Holly Street
Decatur, AL 35602
Of counsel

[Certificate of service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

AFFIDAVIT OF HARVEY ELROD, ATTORNEY OF RECORD FOR PLAINTIFF, TO ACCOMPANY PLAINTIFF'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ETC.

STATE OF ALABAMA
MORGAN COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared Harvey Elrod, who, being first duly sworn, did depose and say as follows:

"My name is Harvey Elrod. I am the attorney of record for the plaintiff in the above-entitled action.

"I commenced that action by filing a complaint in the Circuit Court of Madison County, Alabama. I did that on or about 24 June 1976.

"On or about 7 July 1976, I received a telephone call from the present attorney of record for the defendant in the above-entitled action. After making some inquiry as to why I had sued Mr. Lucas, Mr. Frohsin stated, in the course of our telephone conversation of 7 July 1976 or thereabout, that he was going to have to have the case removed to federal court and that he thereafter would invoke *Barr* v. *Matteo.* I then told Mr. Frohsin, in effect if not in very words, first, that I certainly did not mind having the case removed to this court and, second, to go ahead and invoke *Barr* v. *Matteo,* by motion for summary judgment or otherwise, but that I would have to make some discovery with respect to any such motion.

"As more fully appears from the records of this court in the above-entitled action, Mr. Frohsin did effect the removal of the case to this court on or about 9 July 1976.

"On 14 July 1976, I received a copy of the defendant's motion for a sixty-day extension of time within which to answer the complaint in this action. One of the grounds of that motion reads as follows:

'2. In order for the United States Attorney to effectively defend the action it is required that investigation be undertaken into the merits.

The court granted the requested extension without any objection on my part. I wanted the United States Attorney really to investigate the merits of the suit before answering the complaint.

* * * * * * * *

"In view of the foregoing, and of my several other commitments, it is my opinion that plaintiff will need three or four months in which to complete the discovery requisite to meet such subsequent, and formally sufficient, motion for summary judgment as the defendant may interpose in this action."

Further affiant saith not.

/s/ Harvey Elrod

Sworn to and subscribed
before me, this 23d day of
September 1976.

/s/ Mary Frances Walker
Notary Public, State of Alabama at Large.

* * * * * * * *

Exhibit A to Plaintiff's Response, etc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

* * * * * * *

[Title Omitted In Printing.]

PLAINTIFF'S AFFIDAVIT TO ACCOMPANY CONSOLIDATED INTERIM RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ETC.

STATE OF ALABAMA
MORGAN COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared William C. Bush, who, being first duly sworn, did depose and say as follows, namely:

"My name is William Christopher Bush. I ordinarily use only my first name, middle initial and surname. I am the plaintiff in the above-entitled action. I employed Mr. Harvey Elrod to commence that action.

"Beginning on Sunday, 5 September 1976, Mr. Elrod and I have spent a number of hours in preparing interrogatories to the defendant in that action. I have observed that Mr. Elrod has tied substantially, if not entirely, all those interrogatories to statements set forth in affidavits accompanying what I understand to be defendant's motion for summary judgment, a judgment without trial, in that action.

"I have read those affidavits. I now address the affidavit of the defendant. I do so both as a litigant and as an aerospace engineer with degrees in civil engineering and business administration and twenty-seven years' experience in engineering and management. I also am a veteran of World War II and the Korean Conflict, and, therefore, am entitled to the benefits of

the Veterans' Preference Act of 1944, as amended. (I mention my being a veteran only because it affects my status as a Civil Service employee.)

"Although I find that, as he says, his position description appears to make him "'totally responsible for all facets of the Center's operations,'" I do not know just what specific duties that covers. I do know, both from my own personal experience in Position No. 19343-5 at the George C. Marshall Space Flight Center and from data coming to light during the course of a hearing held at George C. Marshall Space Flight Center in early June of this year and at which defendant testified, that position records do not necessarily mean much in terms of concrete duties.

"I was assigned to that position in November of 1974. In a short time, I found that there were few, if any, actual duties to correspond to the position description. I took the matter up with management at Marshall Space Flight Center, through the bargaining unit for engineers and scientists employed at that facility. That bargaining unit is called MESA, which is an acronym for Marshall Engineers and Scientists' Association. I also sought to enlist the aid of the Assistant to the Deputy Director for Management at Marshall Space Flight Center. His name is William R. Reynolds. In addition, I asked the chief and the administrative officer of the laboratory to which I was assigned to help see if he could not get the position abolished, in order that I might either: (a) be given a position comparable to the one which I had held before the June 1974 reorganization; or (b) be able, by virtue of the abolishment of Position No. 1934S, to try to take early retirement from Government service—in which I had been engaged some twenty-four years.

"After nothing came of my efforts to obtain help within the shop, so to speak, I did consent to an interview by the then Science Editor of the Huntsville *Times* with respect to my situa-

tion as an aerospace engineer drawing some $32,000.00 a year for occupying a civil service position without any current or—at least to me—forseeable, professional work-content. In the course of that interview, I did tell the Science Editor of the Huntsville *Times* that the official description of my then current position was inaccurate; and that the position description had been written for the purpose of supporting the grade of the GS-15 branch chief. (The position [No. 19343-5], which was written up as justifying GS-14 grade, was one of two such positions in the particular branch.) While I probably did not use the very words which the article attributes to me—or, if I did use them, I did so in the context of appeals to the Civil Service Commission—, the article which the defendant mentions in the fourth paragraph of his aforesaid affidavit did contain the words which he quotes from it in that affidavit. Both in my interview with the Science Editor of the Huntsville *Times* and in the other interviews mentioned in the fourth paragraph of the defendant's aforesaid affidavit, I also said, in substance, if not in very terms, that I did not have enough meaningful work to do and that I probably spent no more than thirty minutes a day on official work, etc., as set forth in the mentioned paragraph of the defendant's affidavit. The statements were true.

* * * * * * *

"With respect to the matter of the defendant's having asked his 'subordinate managers with cognizance over Mr. Bush's function to look into the matter and report to...[the defendant],' as mentioned in the fifth paragraph of the defendant's affidavit, I now say that, in June of this year and while testifying at the hearing to which he refers in the ninth paragraph of his affidavit, the defendant, while opining that Position No. 1934-S did afford viable employment opporunity, was able to specify only rather general conversations between him and, respectively, Mr. Richard G. Smith and Mr. James E. Kingsbury, with respect either to my statements or to the impact

of those statements upon Center operations. The conversation with Mr. Smith, as testified to by the defendant, related only to the matter of the impact of my prior statements. The several conversations with Mr. Kingsbury, as testified to by the defendant at the aforesaid hearing commenced with an informal inquiry directed to Mr. Kingsbury with respect to my claim; an "immediate" response that, to Mr. Kingsbury's knowledge, it was not the case that I had nothing to do; instructions to Mr. Kingsbury to look further into the matter and report back to defendant; an ensuing oral report "within a matter of hours"; and, after "more investigation," interim reports which took the defendant and Mr. Kingsbury no further than a review of my "job description"—the same type item as the "official position description" accompanying the defendant's affidavit—and a discussion of "what Mr. Bush was expected to do."

"In the course of the same hearing at which the defendant testified to the above-noted effect with respect to certain of the matters involved in this action, my counsel was able to secure the reluctant production of parts of an item called *An Evaluation of Personnel Management At The Marshall Space Flight Center*. A copy of those parts comprises Exhibit "E" acompanying this affidavit and the other exhibits to my consolidated interim response and motion with respect to defendant's motion for summary judgment. I prepared such copy from the counterpart which counsel for the MSFC, pursuant to express authorization by NASA and the CSC, provided my counsel at the conclusion of the aforementioned hearing. I am asking my counsel to take appropriate steps to obtain an admission from defendant as to the genuineness of the copy presently made Exhibit "E" to my aforesaid consolidated response and motion.

"As will more fully appear upon inspection of the mentioned Exhibit "E," the defendant was a signatory to, and participated in, the study eventuating in the report. Although the cover sheet indicates that the item speaks as of July, 1975, certain of the

contents of the item disclose the following matters of present pertinence:

(a) that "[t]he working environment at at the Marshall Space Flight Center has been characterized by abnormal conditions, unique within the [National Aeronautics and Space] Agency, since 1967...";

(b) that, as of July 1975, the "relationships and understandings [necessary "to full operational effectiveness"] [had] not developed fully, especially in Science and Engineering [,] where the changes have been most drastic...";

(c) that the Science and Engineering Directorate, to which I was assigned at all material times, "was the major contributor to the Center's low standing in many areas of personnel management, as reflected by survey questionaire results...";

(d) that, as of July 1975, the Marshall Space Flight Center was "pursuing the...restoration of its personnel management program to full effectiveness in all of its aspects...";

(e) that, according to certain personnel program objectives for the fiscal year 1975, as transmitted to the Headquarters of NASA on or about 22 August 1974, Marshall Space Flight Center had undertaken a thorough classification review of all engineers and scientists in Grades-13 and above during that fiscal year, with "the results of that review...[being] implemented concurrent with the reduction in force effective March 15, 1975...";

(f) that, "[u]pon completion of reduction-in-force activities, a survey of all other General Schedule positions was initiated since it was recognized that other grade problems existed, especially in the business professional group...";

(g) that "[t]he work force adjustments during the past eight years...[had] necessitated constant position restructuring to maintain viable organization structure and adjust the skills balance to meeting changing missions...";

(h) that, during the period of retrenchment beginning in 1967 or therabout, "the types of positions needed to cope with changing mission assignments and changing nature of in-house capability varied considerably...";

(i) that, during the mentioned period of retrenchment, "[d]ealing with reduction-in-force related position classification and related problems became an MSFC specialty...";

(j) that, during the period under review in the study (which included fiscal year 1975 as well as other fiscal periods), "[a]ll 11 GS-13 and above engineering position descriptions were refined in the classification survey...";

(k) that "[l]abor management relations during the retrenchment period...[had] been difficult...[with] [t]hree temporary restraining orders hav[ing] been experienced since the first reduction in force in FY68.";

(l) that, according to the results of a survey by questionnaire, and on a composite basis, the Marshall Space Flight Center "ranked the lowest of the NASA Centers on 16 out of the 24 questions" relating to quality of supervision;

(m) that, according to a position classification audit summary had in course of the study eventuating in the report, seven of twenty-seven positions under audit had been found to be deficient with respect to accuracy of position description;

(n) that one of the plans and recommendations developed in the course of the mentioned evaluation of

personnel management at the George C. Marshall Space Flight Center was the completion, by 30 June 1976, of an "annual position survey to assure proper position descriptions; proper title, series and grade; [to] identify misassignments; and [to] take corrective action as indicated...";

(p) that another of the plans and recommendations developed in the course of that evaluation was a continuous and ongoing review of new or vacated supervisory positions in order to: (1) Abolish where possible; (2) Emphasize supervisory and management responsibilities; [and] Move responsibility for accomplishment of technical work to subordinates where possible, retaining technical direction and review..."; and,

(q) that another of those plans and recommendations was to "[r]eview all supervisory positions to assure compatibility of responsibilities with delegations of authority...";

"I have additional information tending to refute several of the paragraphs of defendant's affidavit in support of his summary judgment; but I presently am advised that the information is not now in admissible form and that I will have to obtain it from other witnesses in order to be able to use it in this action.

"Speaking on the basis of my observations and experience while employed at Marshall Space Flight Center, I now say that *either* the National Aeronautics and Space Administration, *or* the defendant and those whom he describes as his 'subordinate managers,' *or* employees and officials of the corporations respectively owning the newspaper and the television stations which the defendant mentions in his affidavit, have in their collective keeping the data requisite to the proving of the following matters: (a) defendant's actual relative rank in the Space

Establishment as of the times of the acts of which I complain; (b) defendant's precise duties as of those times; (c) the circumstances under which defendant engaged in those acts; and (d) the identity of those acting in concert with defendant. Since I am not a wealthy person, it will be necessary for me to obtain much of the required data by interrogatories and requests directed to defendant, and by written questions directed to third persons.

"Since the Saturday before Labor Day of this year, I have spent about sixty-six hours gathering data for my lawyer to use in opposing the defendant's motion for summary judgment and helping my lawyer to prepare interrogatories to the defendant. Ten of those hours have had to come out of my annual leave. Since 26 January 1976, I have had to use one-hundred eighty-six hours of annual leave in my efforts to defend myself, and to vindicate my rights as an American citizen engaged in civil service, against the onslaughts of defendant and those acting in concert with him. Much of that annual leave went into the preparation of the appeal to the Civil Service Commission that the defendant mentions in the ninth paragraph of his affidavit which accompanies his motion for summary judgment. So far as I know, I am the only employee at the Marshall Space Flight Center who has not been allowed official time in preparation of such appeals; and there have been many such appeals taken within the last several years. (Please understand that I do not yet contend that I should be allowed what is called "official time" for the prosecution of this case; although it seems unfair to me that, so far, the defendant has been able to use Government-paid talent in the defense of the action.)"

Further, affiant saith not.

/s/ William C. Bush

Sworn to and subscribed before
me, this 22d day of September,
1976.

/s/ Mary Frances Walker
Notary Public,
State of Alabama at Large.

(NOTARIAL SEAL)

My commission expires: 4-25-78

Exhibit B To Plaintiff's Reponse, Etc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

* * * * * * * *

No. CA 76-P-0962-NE

* * * * * * * *

William C. Bush,
Plaintiff,

vs.

William R. Lucas,
Defendant.

ORDER

In consideration that plaintiff's interrogatories served on defendant are unduly burdensome for purpose of the pending summary judgment motion, the court hereby strikes ex mero motu both sets of interrogatories, served August 20 and August 22, 1976. Plaintiff is hereby directed that it may take

defendant's deposition, with the restraint that plaintiff's examination be concluded within three hours, subject to defendant's answers being responsive and straight forward.

Done this the 28th day of September, 1976.

/s/ Sam C. Pointer, Jr.
United States District Judge

---

[1] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

[Title Omitted In Printing.]

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties through their respective counsel, that the deposition of DR. WILLIAM R. LUCAS ... may be taken before C. Frank McMillan, Commissioner, at the offices of Dr. William R. Lucas, Building 4200, Marshall Space Flight Center, Huntsville, Alabama, on the 20th of October, 1976, beginning at 1:00 p.m.

IT IS FURTHER STIPULATED AND AGREED that the signature to and the reading of the deposition by the witness is waived, said deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions.

[2] IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that notice of the filing of the deposition by the Commissioner is waived.

---

*[3] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

[Title Omitted In Printing.]

Huntsville, Alabama
October 20, 1976

BEFORE:

C. Frank McMillan, Commissioner.

APPEARANCES:

Mr. Harvey Elrod, Attorney at Law, ... [Decatur,] Alabama, appearing on behalf of the Plaintiff.

Mr. Henry I. Frohsin, First Assistant United States Attorney, Northern District of Alabama, Room 200 Federal Courthouse, Birmingham, Alabama and Mr. Richard Reeves, Attorney at Law, Associate Counsel, Marshall Space Flight Center, Huntsville, Alabama, appearing on behalf of the Defendant.

[4] I, C. Frank McMillan, a Court Reporter of Birmingham, Alabama, acting as Commissioner, certify that on this date, as provided by the Federal Rules of Civil Procedure, and the foregoing stipulation of counsel, there came before me at the Marshall Space Flight Center, Huntsville, Alabama, Building 4200, on the 20th day of October, 1976, beginning at 1:00 p.m.,

---

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Dr. William R. Lucas, witness in the above cause, for oral examination, whereupon the following proceedings were had:

DR. WILLIAM R. LUCAS,

having been first duly sworn, was examined and testified as follows:

* * * * * * *

[5] Examination By Mr. Elrod:

Q. You are Dr. William R. Lucas? A. Yes, sir.

Q. You are the Defendant in a suit now pending in the United States District Court for the Northern District of Alabama, in which Mr. William C. Bush is the Plaintiff? A. Yes, sir.

Q. In the course of that suit, have you had occasion to file or to cause to be filed by the First Assistant United States Attorney for the Northern District of Alabama, an alternative motion to dismiss or for summary judgment? A. Yes, sir.

* * * * * * *

(Whereupon, the above-referred to document was marked for identification as Plaintiff's Exhibit One.)

MR. ELROD: You might let the record show that I have shown—that I have given Mr. Frohsin a counterpart and I believe the witness has a counterpart before him, and I have one before me.

* * * * * * *

[6] Q. * * * You then have before you, I believe, a counterpart of Plaintiff's Exhibit One; or, if you prefer, I will let you look at Exhibit One and I will look at the counterpart. I invite your at-

tention to, first, to the second of the affidavits which accompany that motion and a part of the motion, namely your, I assume your, affidavit? A. Yes.

Q. For convenient reference I will ask the Reporter to number these paragraphs in your affidavit, just in the middle of the page, just above each paragraph, one through twelve, and that is going to save us some time; or if you prefer, Mr. Frohsin can do it and you can do it yourself. I have numbered mine in the middle like that.

* * * * * * *

[7] Q. Dr. Lucas, in the first paragraph, you of course identify yourself in the first paragraph of your affidavit? A. Yes, sir.

Q. Then you make reference in the third paragraph of your affidavit * * *, in the last sentence of it, to what you say is a copy of your official job description as being attached. Do you find that attached there on that counterpart? A. Yes, sir.

Q. * * * Is that description, position description current as of now? A. Yes, sir.

Q. Was it current as of the 25th of June, 1975? A. Yes, sir.

* * * * * * *

[8] Q. Here or at NASA Headquarters? A. I don't know, either here or Headquarters.

Q. You do hear from Headquarters occasionally? A. Yes, sir.

Q. With respect to personnel matters, is that right? A. Yes, sir.

Q. * * * Your * * * position as Director of the George C. Marshall Space Flight Center * * * is what is called, in governmental personnel parlance, a Public Law 313 Position, isn't it? A. Yes, sir.

Q. Are you familiar with the more modern version of it as a Type 5 USC Section 3104 * * * position, [9] have you heard of that? A. No, sir.

* * * * * * *

[10] Q. You are in the competitive service, aren't you? A. Yes, sir.

Q. And this position has to be approved by the CSC, doesn't it; the P. L. 313 position of which you are presently the incumbent? A. Yes, sir.

Q. And your incumbency had to be approved, didn't it? A. Yes, I assume it did.

Q. Who appointed you to this position? A. The Administrator.

Q. Of what? A. Of the National Aeronautics and Space Administration.

* * * * * * *

[11] Q. In the space establishment, Dr. Lucas, and by the way, as a matter of foundation, you have been in the space establishment what, twenty-five years? A. I have been in the National Aeronautics and Space Administration since July 1, 1960. I have been working in the space program for a longer period of time.

Q. So you have been in NASA since '60, or '61? A. '60.

Q. And before that were you in the private sector? A. No, sir. I was with the Department of Defense, Army working on the space flight program at that time.

Q. At Redstone? A. At Redstone.

Q. Then to go back to the first part of that transcontinental sentence that I interrupted, you folks in the Public Law 313

status in the space establishment, are primarily engaged in a research and development function, aren't you? A. To the— in the sense that all of the space establishment is involved in research and development, most of it.

[12] Q. Were you—

MR. FROHSIN: Wait a minute, let him finish. A. Most of the people at that grade are in the management end of the program.

Q. It still is in a research and development function, isn't it? A. Yes, sir, as is the National Aeronautics and Space Administration.

Q. And * * * NASA's functions are somewhat larger than the functions of George C. Marshall Space Flight Center? A. The Marshall Space Flight Center is an element of NASA, yes.

Q. Is it one of some eight, ten or more field installations for NASA? A. Yes, sir.

Q. And was that so in June of 1975? A. Yes, sir.

Q. * * * And as the incumbent Director of the George C. Marshall Space Flight Center of the National Aeronautics and Space Administration, did you occupy a higher level of authority than any other Director [13] of a field facility of the National Aeronautics and Space Administration, hereafter called NASA? A. No, sir. All the field centers are the same rank.

Q. They are all the same rank, all right. And in terms of rank, well we will employ that * * * in the quasi-military sense here. In terms of rank, how far down the chain of command from the President is the Director of a field facility, and more, specifically, were you as of June of 1975? A. Well, I report to the Associate Administrator for Center Operations, who in turn reports to the Administrator of NASA, who in turn reports to the President.

Q. And in terms of reporting, then the upward flow of communications, there would be two tiers between you and the Oval Office? A. Yes, sir.

Q. * * * You make some reference in the fifth paragraph of your affidavit to certain subordinate managers with cognizance over Mr. Bush's functions. Now, who were those subordinate managers? A. The subordinate manager to whom I delegated that [14] assignment was James E. Kingsbury, who is the Director of Science and Engineering.

* * * * * * *

[16] Q. * * * Mr. Kingsbury, this man you referred to a while ago as the subordinate manager to whom you delegated the matter of looking into ... what you [17] describe as Mr. Bush's allegations, was he a Public Law 313 employee? A. I don't know. He is either Public Law 313 or a NASA excepted.

Q. Do you know whether he caused any other subordinate managers further down the chain of command to look into the matter? A. He told me he did.

Q. Now this is the same Mr. Kingsbury, that a few months later signed a notice of proposed adverse action against Mr. Bush, isn't it? A. Yes, sir.

* * * * * * *

Q. In addition to this inquiry, among the subordinate managers, you say in paragraph five of your affidavit, * * * in effect, that you requested an independent investigation into Mr. Bush's allegation? A. Yes, sir.

Q. Now when was that investigation completed? A. I think around the 1st of July, 1975.

Q. It had not been completed at the time that you made the utterance that you attribute to yourself in the [18] seventh

paragraph of your affidavit, is that right? A. That is my understanding.

* * * * * * *

Q. * * * The investigation to which you referred in making this utterance [19] was not the independent investigation you referred to in the earlier paragraph of your affidavit, was ... it Dr. Lucas? A. Yes, sir. I referred to the investigation made by Mr. Kingsbury and also the investigation in progress by Dr. Olsen from which I had received a preliminary report.

Q. And this report—the investigation was completed in the latter part of July? A. Latter part of June is my recollection, completed on the 1st of July, around the first of July.

Q. Then you predicated your utterance on both the independent investigation and the inquiry among your subordinate managers, is that correct? A. That is correct, sir.

Q. You spoke with the benefit of an interim report of the independent investigation, is that correct, sir? A. That is correct, sir.

Q. And in that interim report, were there any witnesses' names given? A. Not to me. The report was made to me from my subordinate, Mr. John Potate, who in turn had received [20] the report from Dr. Olsen.

Q. You never saw the report in writing from Olsen, prior to the time you made the utterance? A. I did not.

* * * * * * *

Q. Apart from Mr. Potate and Mr. Kingsbury, what other subordinate managers do you recall having become involved at all in this inquiry, prior to the time you made the utterance? A. According to Mr. Kingsbury, or his report to me, he reported that he had involved all levels of management between himself and Mr. Bush.

Q. Did he report whether anybody had interviewed Mr. Bush at that stage? A. He did not report that to me, sir.

Q. Now, you say all levels of management; all levels of management would have had a community of interest in getting at the root of the problem, if it was a problem wouldn't they? A. I am not sure I understand your—

[21] Q. All of the levels of management would have had a community of interest in ascertaining whether Mr. Bush was correct or not, wouldn't they? A. I think all levels of management would have an interest in determining whether Mr. Bush was—what he said was true or not, yes, sir.

Q. And all levels of management would have been affected adversely by a determination that what Mr. Bush said was true, is that correct? A. Not necessarily.

Q. And then in what manner, * * * or on the basis of what factor, would they have avoided such an adverse affect? A. I wouldn't want to presume the adverse affect. I think—

Q. Then there would have been no adverse affect? A. I don't know that, sir, it depends upon what they found. If they found that the claims made by Mr. Bush were correct, then it would have been incumbent upon them to correct that situation.

Q. If they found that there was any element of truth in Mr. Bush's claim, that he did not have meaningful [22] work to do, would that have had an adverse impact on management here at all levels? A. I don't know, sir. That would be speculation and I just don't know.

Q. Well, let's speculate.

MR. FROHSIN: Well, let's don't speculate. He doesn't know.

MR. ELROD: He is the head of it, he is the head of the facility.

MR. FROHSIN: He is not going to speculate, he can answer the question, but if he doesn't know, he just doesn't know.

* * * * * * *

[24] Q. Since you have been serving as Director of George C. Marshall Space Flight Center, Dr. Lucas, have you from time to time received any instructions from Headquarters of NASA? A. Received instructions?

Q. Yes, sir. A. Yes, sir.

Q. How frequent—at what intervals do you receive some instructions? A. Well, we receive instructions at all levels, [25] about our budget or about our resource management, things of that nature. I suppose that we get some communications from Headquarters at least on a weekly basis.

Q. From time to time you receive instructions with respect to personnel matters, do you not? A. We receive policy guidelines with respect to personnel.

Q. Then you do not make policies with respect to personnel? A. Yes, sir, I do make policies.

Q. All right. What policies have you made as Director of Marshall Space Flight Center, with respect to personnel? A. Well, there are numbers of policies that I have made. First of all, I provided the organization chart, I determined the allocations of manpower into the various elements of our center. I determine the human resources that would be allocated to various programs that we have. I have approved charters of the organization.

Q. That was also pursuant to guidelines which emanated from Headquarters in NASA, wasn't it? [26] A. The organization originated here.

Q. I'm talking about your activity in determining the allocations of manpower and approving charters and so forth? A. No, sir. Headquarters does not tell me how to allocate the resources.

Q. Your activities in this area * * * have been pursuant to NASA guidelines, have they not? A. Yes, sir.

Q. You have not deviated from the Federal Personnel Manual, have you, to your knowledge? A. Not to my knowlege.

Q. The policy that you have formulated for this field installation has related primarily to the utilization of resources here in the research and development, hasn't it? A. To the utilization of our resources and research and development—

Q. Yes, sir. A. Yes, sir, that is true in that that is what we are involved in.

[27] Q. * * * I notice that your positional record which * * * follows your affidavit says, in a passage that you adopt in your affidavit, that the Director is totally responsible for all facets of the Center's operation; is that correct? A. Yes, sir.

* * * * * * *

[28] Q. At the time that you made the utterance, was there already in course a series of events that led to adverse action against the Plaintiff in this case? A. Not to my knowledge.

Q. This investigation that you mentioned, didn't have any—didn't contribute at all to the adverse action that subsequently was taken against this Plaintiff? A. It may or may not have, I answered I don't know of any series of events leading to adverse action.

Q. Well, do you know of any isolated events leading to the adverse— A. No isolated events.

Q. Do you know whether or not you made a decision in the course of adverse action? A. I don't understand.

Q. Do you know whether you made a decision in the course of that adverse action? A. I made a decision as represented by the letter that I put in the record.

Q. And that was an event, wasn't it? A. Yes, sir.

Q. * * * Do you know of any other isolated [29] event, in the course of that—just this fortuitous and adventitious concatenation, just in the course of that, do you know of any other events? A. Sir, I am sorry, I don't understand your question.

Q. You don't know of a series of events, so I assume that we will have to treat them as fortuitous, as a concatenation of unrelated events. Do you know of any other isolated unrelated event, other than your letter, in this course of adverse action? A. Well, I am aware of Mr. Kingsbury's letter of proposal.

Q. The letter of Proposed Removal? A. Right.

Q. Now the overall research and development program—in other words, would it be fair to say that the research and development program that was being implemented, was Marshall's mission here? A. Yes, I think so.

Q. That Marshall's mission is the implementation of certain phases or features of overall research and development programs? A. An overall research and development program of NASA projects.

[30] Q. Now, in order to go forward with any particular part of that program or any program or any part of that mission, * * * do you not have to have specific authority from NASA, didn't you have to have that in June of 1975? A. To discharge any mission here?

Q. Yes, sir. A. No, sir.

Q. You were given a program? A. I am given a program to implement and I am also charged with the responsibility of generating programs which does not require approval.

Q. * * * So to answer my question of several minutes ago with respect to the facet to which you were concerned at the time you

made the utterance, you were concerned with the overall mission of Marshall, is that correct? A. That is right, sir.

Q. Did it appear to you at the time, as best you can now recall, that these statements that have been attributed to Mr. Bush, held any significant portent for that mission? Did it appear to threaten the mission? A. I can't—I can't judge whether it threatened [31] the mission or not. As I testified earlier on that occasion I was responding to a question that was asked of me by the press.

Q. Yes, sir. And did you respond extemporaneously? A. Extemporaneously in the sense that I did not have written down a statement to make. However, I had considered how I would answer a question if asked on that matter.

Q. Well, did you consider that by yourself? A. Yes, sir.

Q. Or in consultation with somebody or both? A. I considered it by myself.

* * * * * * * *

[33] Q. At the time you made this utterance, Dr. Lucas, had you—and prior to that time, had you—did you wish that Mr. Bush wouldn't make such statements as those that have been attributed to him in the paper? A. Did I wish he wouldn't make them?

Q. Yes, sir. [34] A. You know, it never occurred to me until I saw it in the paper.

Q. Well, after you saw it in the paper, did you begin wishing he wouldn't do that again or do it anymore or anything like that anymore? A. I suppose I—it is hard for me to recall exactly what I might have wished. But, I wished of course that the problems of this nature would have been taken up within the management structure of the Center, or at least the Agency.

Q. You weren't aware at the time of any effort that he had made in that direction? A. No, sir.

Q. By the way, did you make any inquires, before you made the utterance, did you make any inquiry as to what efforts Mr. Bush had made to obtain, I won't say redress, but relief here within the facility? A. Redress for what, sir?

Q. I say I won't say redress, relief, relief for his grievance, whether real or fancied? A. No, sir.

Q. * * * Then at the time you made the utterance, you didn't know whether Mr. Bush had—whether [35] he talked to the newspapers as a matter of last resort or a matter of just venting ... his spleen or whatnot, did you? A. I didn't know the basis for which he talked to the newspaper.

Q. You hadn't bothered to make any inquiry to see whether there could have been any rational basis for such, what apparently appeared to you to be, an irrational act, had you? A. Yes, sir. I asked Mr. Kingsbury, as I testified here earlier, to investigate the fact of the matter surrounding the news release.

Q. Did this occur to you to be an irrational act on Mr. Bush's part? A. I had no basis for judging the rationality of the thing.

Q. You didn't? A. I did not. I didn't have that fact, all I saw was the article and I asked my subordinate Mr. Kingsbury to investigate the facts.

Q. You were the Director of the facility at the time, weren't you? A. Yes, sir.

[36] Q. And yet you had an investigation made to determine whether there was any basis for Mr. Bush's claim that he didn't have meaningful work to do at the facility for which you were Director, is that correct? A. That I worked through my subordinate managers.

Q. Then you didn't know, without the investigation, whether there was any basis in fact for the statement? A. No, sir, I did not.

* * * * * * *

[37] Q. * * * When did you request this independent investigation that you refer to in the fifth paragraph of your affidavit? A. That was several days, and I don't recall when, several days subsequent to the press conference I requested that.

Q. * * * You requested an investigation subsequent to the press conference, all right. A. Several days, I said, sir, after that.

Q. Subsequent to the press conference? A. Subsequent to the press conference.

Q. And after the time you made the utterance? A. Yes, sir.

Q. * * * Now just for the record as a matter of a little item of housekeeping. Throughout [38] when we refer to the affidavit, I mean, of course unless I say Mr. Groo's affidavit, I mean Dr. [Lucas'] affidavit that accompanies his motion for summary judgment, and when I say the utterance, I'm talking about [what] he attributes to himself in the eighth paragraph of that affidavit, and we will save a whole lot of time.

MR. FROHSIN: I'm going to clear up something for the record too, and I'm not sure—I'm not trying to place words in the mouth of the Deponent, and I'm not sure I understand counsel's question. But, if I understood your prior question you were talking about the investigation conducted subsequent to the press conference, you are talking about the ratification of the investigation or the investigation that had been conducted prior to the press conference for which you have alluded to, and I don't understand.

THE WITNESS: I misspoke that prior to the press conference. I was confused there, I am sorry, that I made a wrong statement there. The investigation I referred to is prior to the newspaper release, not the press conference. But then I asked Mr. Kingsbury—to clear the record of that, I asked Mr. Kingsbury to make an investigation immediately, as I recall on the [39] next day following the newspaper release of May 15th. And then some day subsequent to that news release, but of course prior to the press conference in which I answered the question, was when the independent investigation was started. I confuse those two things, the news release and the press conference.

* * * * * * *

[41] Q. * * * Now whenever it may have been that you requested the investigation, Dr. Lucas, whether it was before or after the press release or before or after the press conference, whenever it was, do you recall * * * to whom it was that you addressed this request? A. For the independent investigation?

Q. Yes, sir. A. I addressed it to Mr. John Potate, told him to address it to Mr. Olsen of the NASA inspection representative here.

Q. Is Mr. Olsen sort of in residence here? A. He is in residence here at the Center, and covers an area surrounding the Center.

Q. Is he sort of the watchdog for NASA? A. He reports to NASA Headquarters.

Q. Sort of monitors things here, and you say that is an independent investigation, now? A. Independent investigation in that — in the sense that he doesn't report to me. He reports to a Mr. Cummings in Headquarters.

[42] Q. Is there a lawyer, sort of detached from NASA's Headquarters, that is lurking somehwere around here watching you all most of the time? A. Well, I don't know that we have a lawyer detached from Headquarters lurking around and watching us.

Q. Well, is there anybody on the premises that is down here from NASA Headquarters to exercise a kind of monitoring function? A. Not to my knowledge. Mr. Olsen makes investigations, Dr. Olsen makes investigations, as I understand.

Q. If there is somebody around here from NASA * * * whose function it is to check on the local management, you don't know it, is that right? A. Well, let me — let me resay it. I have identified Dr. Olsen as a representative of the Inspections Office, and then we have a representative of the Audit Office here.

Q. All right, who is that? A. That is Mr. — I can't think of his name — I have to provide that name for you, the NASA Audit Office is located here.

Q. What is the NASA Audit Office? A. Well, that is a group of auditors that audit **[43]** various aspects of our operations.

Q. Is there more than one auditor, so to speak [,] here? A. There is one head auditor and then he has some subordinates and I don't know how many.

Q. And they function independently of the local management? A. Yes, sir.

Q. But they are [,] so to speak [,] in residence here? A. They occupy space here.

Q. They are on the base? A. Yes, sir.

Q. You don't rightly know what they might be doing then at any given time? A. They are not responsive to me at any given time and we identify to them what we would like to have

audited, and they do that at our request. And then I assume they either make on their own initiative or directive to make audits on other basis. But, they are not subordinate to me.

Q. Then at least in some respects your functions as Director of the George C. Marshall Space Flight Center, are subject to a continuing and ongoing and constant **[44]** surveillance by representatives from the NASA Audit Office? A. I think that is correct. I think the role that they occupy is a typical auditor function.

Q. Outside auditor? A. Yes, sir.

Q. * * * Now Mr. Potate of course was not a part of that audit team, was he? A. Which audit team, sir?

Q. The one that we have been talking about, he has never been a part of that? A. The audit team?

Q. Yes, sir, or a group that is from NASA that — A. The resident auditor.

Q. The resident auditor? A. No, sir, he was not a member of that.

Q. * * * He was your conduit to the Investigations Division of NASA, in order to obtain this independent investigation, is that correct? A. That is correct, sir.

Q. Do you know whether he had to state any grounds for wanting that investigation? A. I don't know what he had to state. I delegated **[45]** to him the authority to get it done.

Q. You delegate a good deal necessarily, don't you? A. I do indeed, yes, sir.

* * * * * * *

Q. The areas in which you directly, without intermediary at all, in which you directly are called upon to exercise dis[cretion]

are limited to some extent by virtue of the fact that you delegate a substantial part of your function to subordinates, is that correct? A. I exercise my job through my subordinates, yes, sir.

Q. And you exercise your discretion when you engage your subordinates, is that correct? A. That is right.

Q. And then you leave it up to them to carry out your — the assignments that you give them? A. That is correct. And, I require reports from them.

[46] Q. * * * At the time that you asked Mr. Potate to see about getting this investigation, this independent investigation [,] started, had you had any occasion to talk with any of your subordinate managers other than Mr. Potate, with respect to the probable impact of what you call the news release and I will call [the] May 15th article? A. I talked — I had received periodic reports from Mr. Kingsbury on the progress of his investigation. I had discussed the issue, as I mentioned with Mr. Potate, and I had also discussed it with Mr. Smith.

Q. How did you define the issue when you talked to Mr. Potate? A. Well, the news article, the impact of that article on our operations. And I asked Mr. Potate to have an independent investigation made of the case.

Q. Did you ask him to have an independent investigation made of the impact? A. No, sir, just the facts in the matter.

Q. The investigation was not directed toward the impact then, was it? A. No, sir.

Q. It was directed toward ascertaining whether or [47] not in point of fact, so far as the investigator was able to determine, whether Mr. Bush did have "meaningful work to do", is that correct? A. That is essentially it, yes, sir.

Q. Now apart from Mr. Smith and Mr. Kingsbury and Mr. Potate, have you had occasion to discuss Mr. Bush's statements,

as published in the 15 May article, with anybody here, any of your subordinate managers, apart from the ones I have just mentioned, Smith, Potate, Kingsbury? A. At what time, sir?

Q. [P]rior to the time you made this utterance, first? A. I don't recall having discussed that with someone between the time of the newspaper article and the time I made the utterance.

Q. * * * I will narrow it even further. Between the time you made the utterance and Kingsbury sent his Notice of Proposed Removal to Mr. Bush, did you have occasion to discuss the matter with anybody other than Smith, Kingsbury and Potate? A. Anytime between the time that I made the utterance **[48]** and the time that Mr. Kingsbury made —

Q. The time — that was * * * on or about 1 August, 1975, wasn't it—that he gave him that notice? A. Yes, sir.

Q. * * * At the time [,] and we will call it the August notice, between the time of the utterance in late June of '75 and the August notice, had you had occasion to discuss with any of your subordinate managers [,] first, the matter of Mr. Bush's, as you call them, allegations? A. I don't recall that I did. I may have discussed it at that time with Mr. Howell Riggs, who is the Director of our Personnel Office, but my recollection does not allow me to place it in that frame.

Q. You do recall having discussed the matter at some point in time as you say? A. With Mr. Riggs?

Q. With Mr. Riggs, is that right? A. That is correct.

Q. What was the occasion for you[r] discussing it with Mr. Riggs? A. The occasion was in conjunction with the decision that I made.

[49] Q. The range of punishments? A. I don't recall specifically that I discussed the range of punishments, but the format... for the decision letter and things of that nature.

Q. At the time that you made the utterance, did you conceive that Mr. Bush had been guilty of any erroneous statement of fact, as distinguished from opinion? A. Well, at the time I made the statement, I really didn't consider Mr. Bush's motivation at all. I simply responded to a statement that had been made.

Q. I'm not talking about motivation, I'm talking about whether did you conceive that his statement, whatever his motive might have been then, was ... true or untrue? A. Well, when I considered that part which I summarized by saying he had no meaningful work to do, I spoke to that by saying that that statement didn't have basis in fact.

Q. Then you did conceive that that statement was not correct; is that correct? A. The statement that he had no meaningful work to do was inconsistent with the information supplied to **[50]** me.

Q. Therefore you concluded it had no basis in fact? A. Yes, sir.

Q. Did you ask any of these people, these folks that were reporting to you, either Kingsbury or Olsen, if they had asked Mr. Bush about whether he actually made the statements? A. I didn't ask that question, no, sir. I believe Mr. Bush appeared on T. V. and made the statement.

Q. Well, * * * was that one of the several things you had in mind when you responded to the T. V. reporters' questions about whether he had meaningful work? A. I had in mind the statement that Mr. Bush had made, that he didn't have meaningful work to do in mind when I responded to the question of the T. V. reporter.

Q. However that may have been disseminated, whether by print media or broadcast media? A. That is right.

Q. The subordinate managers that you refer to in your affidavit, are they friends of yours as well as professional col-

leagues? [51] A. Not special friends. I have known, I believe I have known, them all for some period of time.

* * * * * * *

[52] Q. * * * In the sixth paragraph of your affidavit, * * * you say "[a]s a result of both investigations, I was assured that Mr. Bush did have a valid job description; that the function for which he was responsible was necessary to fulfill the Center's mission; that he did have enough meaningful work to keep him busy; and that, in fact, he had been putting in a reasonable day's work." Did you get the assurance from all of these heads or from a single person or did different phases of the assurance come from different sources? A. I obtained the assurance from Mr. Kingsbury on the basis of his investigations which I presumed he got from other sources. And I obtained the information from Mr. Potate who obtained it from Dr. Olsen, whom I presume got it from several other sources.

Q. And this was all before the utterance? A. Yes, sir.

Q. At the time that you, as you have sworn, were assured that he had a valid job description, was there any problem at all out here at Marshall Space Flight [53] Center about position descriptions? A. I don't know that. Any problem at all, I would — there could have been some problem and I couldn't testify there was no problem at all about job description.

Q. On the other hand, couldn't you testify that you were a participant in an ongoing joint venture survey of personnel practices at Marshall Space Flight Center at about that time, that showed that there was a substantial problem in position descriptions out here? A. No, sir. I couldn't say that at that time.

Q. That a survey wasn't going on at that time? A. The survey that I assume that you refer to, a survey conducted in the summer and fall of 1974, at which time we evaluated and rewrote in

a different format all of the GS-14 and 15 and selected GS-13 jobs in Science and Engineering. But that had been completed before I made the utterance. We are continuing to, even presently, to rewrite the job descriptions of the non-engineering jobs presently.

Q. Let the record show that I am exhibiting to the witness what purports to be a copy of Exhibit E [54] to the Plaintiff's interim response to Defendant's motion for summary judgment in this matter.

Does that item appear to bear a facsimile of your signature there, Dr. Lucas? A. Yes, sir, that is right. I signed that document.

Q. And it speaks as of when? A. Let's see, July of '75, that was a different thing to which I answered a few moments ago, a different survey.

Q. Oh, okay. Then this — the survey to which you had reference a while ago, was it a joint venture ... with the Civil Service Commission? A. It was a joint venture basis with — no, really not a joint venture basis. It was a venture by the Marshall Space Flight Center in which we gained the help from Headquarters classifiers and from classifiers that we brought in from other Centers to reclassify the job descriptions that I described earlier. This right here is a joint vent[ure], this is a self study that was a joint venture with the Civil Service Commission. This is a different document that referred to a different topic than my answer given previously.

Q. * * * Let's defer this one, then that you [55] have your hand on there [,] Exhibit F —

MR. FROHSIN: E.

Q. E, rather [,] to the Plaintiff's interim response to your motion for summary judgment; and we will defer that and talk

about this other survey. The other survey which you alluded to a while ago in answering one of my questions, was it had at the special instance of the acting Associate Administrator for Center operations of NASA, or Dr. Low? A. The job survey?

Q. Yes, sir. A. No, sir. That job survey originated in this fashion: At the time we were getting ready to make a very substantive reorganization of the Center which was placed into effect in early June, 1974. And we are doing co[incident] with a reduction in force, and the Civil Service Commission investigated the procedures that we were using to place the reduction in force, or to implement the reduction in force, and in the process of doing that, concluded that we had no real problems as far as the procedures being used for the reduction in force. But they did observe that some of the job descriptions appeared to, as a matter of concern **[56]** to them, they questioned whether they were sufficiently written or accurate. And it was on that basis that we undertook the survey, a very massive survey to be completed in a few months, of all job descriptions that I described earlier. And to do that, we did gain the support of the Headquarters classification experts and we brought in classifications experts from some other Centers as available to do that survey. And rewriting of all of the job descriptions in a new format designated by the Civil Service Commission, which I understand will be eventually applied across the board in Government.

Q. You rewrote the position descriptions first for Scientists and Engineers at GS-14 and above; isn't that correct? A. And selected GS-13's.

Q. And selected GS-13's, all right. You happen to know what Mr. Bush's general schedule level was or grade was at the time that this was going on, the survey was going on? A. I think it was a GS-14.

Q. Then he ...[,] like the other GS-14's in the scientific and engineering directorate here, would have **[57]** had his position record rewritten sometime between say June of '74 and July of '75, is that correct? A. Yes, sir.

Q. Now to this second evaluation or survey of which a counterpart of the cover sheet of it was marked Exhibit E to the Plaintiff's interim response to your motion for ... summary judgment, that was a somewhat more ambitious undertaking than the survey you just referred to a while ago, wasn't it? A. I wouldn't — I would not say so, sir. To rewrite all the job descriptions that we rewrote was a very ambitious undertaking. This was a self-evaluation to enable us to find wherein we needed to improve and to set ourselves a course to do that.

MR. FROHSIN: When you say this?

THE WITNESS: That is Exhibit E, is that it?

Q. Yes, sir. And in the course of that self evaluation, which incidentally was had I suppose, or I suggest and tell me if I am wrong, at the express direction of the Associate Director for Center Operations, wasn't it? **[58]** A. To the best of my knowledge that was an evaluation that was asked for by the Civil Service Commission. I am not sure if it came directly to us or through Center Operations and I presume it was not pointed only at Marshall, but is done in several places.

Q. I see. In any event in the course of that evaluation, you all, and I say you all advisedly because you did participate in it, didn't you? A. I approved the document.

Q. * * * Found that there were certain weaknesses in personnel administration here at the Flight Center, * * * didn't * * * [you]? A. Yes, sir, we found certain weaknesses and certain strengths.

Q. * * * And if you will look now, please, sir, down several pages, I believe it would be about the thirty-ninth page number in the upper right-hand corner [—] somebody has added that number. Is there a paragraph two there in the middle of the page? A. Yes, sir.

Q. Then turn to the next page and sub-paragraph c, **[59]** and tell me, does that paragraph say in substance that the study showed that there were certain deficiencies in position documentation here and that the Center had made some progress toward ... straightening the matter out, and that any residues would be corrected in the fiscal year ... '76? A. Yes, I believe that is essentially what it said. It says, as I would view it [,] ... [that] a substantial step has been made in straightening out the engineering positions.

Q. * * * And when did the fiscal year of '76 begin? A. It began in July 1, '75.

Q. * * * And at the time — let me ask a preliminary question[:] Had you seen a draft of this item, a truncated part of which is Exhibit E to the Plaintiff's response to your motion for summary judgment, had you seen any part of that item or any draft of it [,] at the time that you made the utterance? A. I don't recall.

Q. Well, in the normal course of events, would you have seen it if it speaks as of July of '75, would you **[60]** have seen it before the 25th of June, '75? A. I would normally do so, but I don't know whether that was on the 31st of July or the 1st of July. I just don't recall.

Q. But the fiscal year — A. But I would see it several days before I signed it, I am sure.

Q. Let's see, then do you have any judgment or recollection, whether or not you might have seen a draft of this or some

preliminary memorandum with respect to subject matter of that item, before you made this utterance? A. I just don't recall.

Q. In other words, you don't have any recollection or judgment at all? A. As to when I saw it?

Q. As to whether you had seen either the final item, the final evaluation of personnel management at Marshall Space Flight Center, or any preliminary draft of it, prior to the time you made the utterance? A. I don't know, sir. I don't think it would have affected the utterance.

* * * * * * *

[62] Q. * * * Then was the utterance something that was entirely separate and apart from the adverse action process against the Plaintiff, Mr. Bush? A. What — to what adverse action do you refer?

Q. The one, the only one I know of is when he was down graded two grades, which you did. A. Oh, no. No, no, that — I was not of course not.

* * * * * * *

[63] Q. And they were entirely two different things? A. Yes, sir.

* * * * * * *

[65] Q. * * * At the time that you made the utterance, were you giving any consideration at all to taking adverse action or having adverse action taken against Mr. Bush? A. No, sir, to both of those questions.

Q. Dr. Lucas, are you — do you have any knowledge or information as to whether supposedly disinterested observers have reported to you at any time in the relatively recent past, that it seemed to them that adverse actions against personnel at Marshall Space Flight Center seemed frequently to follow the par-

ticular employee's complaining about his job or his status? A. Disinterested observers?

Q. Supposedly disinterested, I'm not vouching for them, I'm just saying — **[66]** A. That have reported that —

Q. Have communicated to you that they came here and made a tour and looked around, and sent ... [word] back to you that it appeared to them a good way to get an adverse action going against you here is to complain about your job or your status, in effect? A. The only instance I can recall, and I am not sure that I recall specifically as you have recited it. But, I recently have received a letter from Senator Allen, which included a report alleged to have been made by members of his staff here on the basis of some discussions with people that implied that. But I am not aware of any investigations, I wasn't aware of their presence here nor in fact that they were here.

* * * * * * * *

Q. Have you received any report, Dr. Lucas, in the relative[ly] recent past [,] to the effect that independent observers, or at least allegedly independent observers [,] had p[er]ceived or apprehended [,] or thought they had p[er]ceived or apprehended, or had the impression of a kind of general fear of reprisal by the Marshall **[67]** management against employees for union participation by professional and technical employees? A. Union — I didn't get the last two phrases or the last phrase there.

Q. Participation by — union participation by professional and technical employees? A. If there was fear of reprisal?

Q. Yes, sir. A. Against them — In this report that I referred to which Senator Allen sent to me with a cover letter that said he recognized there is only one side of the issue, one they had perhaps drawn that conclusion from that report by his staff.

Q. You have given him the other side by now, I take it? A. No, I have not. I am going to give him the other side at least I will give him whatever side is right.

Q. That is more than apt to be management's side, I expect? A. Well, I would say we try to give what is fair.

[68] Q. * * * Have you ever had any inquiry from the Administrator of NASA, Dr. Fletcher [,] with respect to your participation in the adverse agency action against Mr. Bush? A. At the time this was under consideration, as I recall it, after the charge letter had been given, Dr. Fletcher received inquiries from Senator Proxmire, I believe, and perhaps others. And he did call me on the phone and ask me the status of the case.

Q. That is all, that is the only contact, the only inquiry that Dr. Fletcher made of you with respect to the adverse action against Mr. Bush? A. That is the only one that I recall.

Q. . . . I believe you indicated you have got some sort of instructions maybe once a week or something like that: but, by and large, are you in a daily contact with NASA Headquarters by electronic . . . [means]? A. I personally am not on a daily contact with NASA Headquarters. And, to the earlier question, the answer I gave you referred to the Center, not to me personally.

Q. Yes, sir. A. but, we get — we are in mail communication with [69] Headquarters obviously, and we do refer — we do communicate by telephone. And we do communicate personally and directly.

Q. On a daily basis. A. Not on a daily basis.

Q. In your judgment, how often do you call Headquarters at NASA? A. On any matter?

Q. Yes, sir. A. Oh, I would say probably about once a week. Some weeks there might be several times, there may be two or three weeks when I don't call at all.

Q. Does NASA Headquarters sometimes call you? A. Yes, sir.

Q. Some person at NASA Headquarters sometimes calls you? A. Yes, sir.

Q. Mr. Groo ever call you and talk about matters? A. Mr. Groo calls me occasionally.

* * * * * * * *

[70] Q. What opportunities has he had to know what your functions and duties were? A. Well, when he has visited the Center on occasions.

Q. How often? A. Oh, I guess two or three times a year. And he comes for a rather comprehensive Center review on a[n] annual basis. And then he usually appears one or two times between that and we have a meeting of Center Directors with him on a periodic basis, I would say about bi-monthly, the various Center Directors get together with Mr. Groo. And I'm sure that he has other means of finding out what is going on.

Q. The Center Directors' [meetings,]...do they kind of rotate from one Center to the other? A. Yes, sir.

* * * * * * * *

[74] Q. You have a Director of Safety here on this base? A. Yes, sir.

Q. Who is he? A. Mr. R. L. Smith, Jr.

Q. Would he be conversant with that, with what in general your functions and responsibilities are? A. Yes, I believe I mentioned him as one of those.

Q. How long has be been in that position? A. Well, let's see, I suppose about two years or maybe, I don't know, one of two years.

Q. Who was his predecessor? A. His predecessor, Dr. Leslie Ball.

Q. Would he have had substantially the same opportunities as Mr. Smith to observe your duties and functions? A. Yes, sir, I think he would, except that I don't believe he was Safety Director very long while I have been Director. I am reasonably sure that he has [75] not.

Q. You mean he has not been Safety Director? A. He has not been Safety Director to any significant amount of time while I have been Director.

Q. Were the duties and authorities and responsibilities of the Office of [Safety] Director of the George C. Marshall Space Flight Center of NASA changed at the time that you became Director? A. Not to my knowledge.

Q. Then if Dr. Ball — is it Dr. or Mr.? A. Mr. Ball, I believe.

Q. If Mr. Ball was here prior to — was here as Safety Director or whatever that title was, prior to your incumbency, he would have had the opportunity to observe the duties and functions and responsibilities that appertain to the office of [Center] Director, is that correct? A. Yes, I believe that is correct.

* * * * * * *

[79] Q. * * * When the time came for adverse action to be taken against Mr. Bush, did you and Mr. Kingsbury have a community of interest in the seeing that that action was taken? A. What do you mean, community of interest, sir?

Q. Did you both want to see that the action was consummated? A. No, sir. I didn't become involved in that until Mr. Kingsbury had decided what to do about the matter, or recommended.

Q. You did see a draft of the August letter, didn't you, Dr.? A. Yes, sir, I testified that I saw a draft of the August letter.

Q. Was * * * the exhibiting of that draft to you [,] prece[eded] by any discussion * * * between you and Mr. Kingsbury? A. No, sir it was not.

Q. In other words, he walked in, and in effect he said I have decided to give Mr. Bush notice that we are firing him, in substance? [80] A. That is the first time I discussed the matter with Mr. Kingsbury on that. I had heard from my legal office that S. and E. was recommending action against Mr. Bush, but I did not engage in that discussion with Mr. Kingsbury.

Q. Is that the only place you heard that from, your Legal Office? A. I believe that is correct.

Q. After the oral reply session in the course of that adverse agency action, did you have occasion to express your views about firing Mr. Bush? A. No, sir.

Q. To any of your confidants? A. No, sir.

Q. You didn't? A. Did not.

Q. Whether you had occasion or not, did you? A. No, sir.

Q. Now, if you will, look at the ninth paragraph of your affidavit a minute, please, sir, and I want to ask you two or three questions about that, and then try to draw some loose threads together here and then we will stop. [81] You notice you say, "[B]ecause of Mr. Bush's many public remarks which were misleading and often false, and which brought discredit to the

Government Service, he was notified by a letter dated August 1, 1975 from Mr. James E. Kingsbury," and so forth, of a proposed adverse action to remove him from Center employment. Let me ask you first about that passage, and I want to ask you this: Did those public remarks substantially complicate your task as Director of George C. Marshall Space Flight Center? A. The fact that — I really — they complicated it in the sense that my judgment was that those public remarks which were false and misleading was depressing to the moral[e] and to the attitudes and respect of the people in the Center, for the Center, they would affect the productivity of the Center and that, in that sense it complicated them.

Q. I have asked you a question or two along those lines on prior occasions, do you remember? I asked you a question or two along the effect on the moral[e]? A. Yes, sir.

Q. Do you recall I asked you to name the people [whose] . . . moral[e] was affected [82] A. Yes, I recall that.

Q. Do you know how many you were able to name? A. Well, I named — I named a few people that I had had some expressions from, and I indicated that it was my judgment that such statements would affect the morale of the people.

Q. * * * Now, you have characterized some of these statements as false. Do you recall offhand which ones, any one that was false? A. If you could provide me a copy of my decision, I'll be glad to.

Q. Let's have copy of this decision letter. A. I can indicate which I consider false and which I consider misleading.

Q. While he is looking for that, I will ask a preliminary question: You differentiate between those that are outright false and those that just have misleading tendencies? A. Yes, sir.

MR. BUSH: Here it is.

THE WITNESS: All right. I will refer to the second page of that letter, looks like paragraph B or Two, that sub paragraph B, then about one third of the **[83]** way,["] as a result, you were publicly quoted as making the following statements:

Number (one): "That position number 19343-S was written [im]properly to support the GS-15 Branch Chief and was a falsehood, and travesty and worthless." I would consider that false.

"That you were reporting what appears to be a fraudulent use of federal funds." I would consider that misleading.

(3) "That personnel records had been removed from your desk." I would say that is misleading.

"That you were told by management to keep my mouth shut." And I would say that is false.

"That personnel actions taken by MSFC made a mockery of a Civil Service Commission's decision —", and I consider that false.

"That you are not the only one at Marshall who had a grossly inaccurate job description." And I would consider that misleading.

"(8) That you had never been told who to **[84]** supervise." I consider that false.

And (9) "That you did not have a telephone for eleven months." That is certainly misleading, if not false.

Q. • • • Any others? A. I think that is about it. Down here where it says "I don't even know what their jobs are," that is either false or misleading. "You state that if your job is abolished a whole lot of other people will lose their jobs too," and that is false.

• • • • • • •

Q. Who is it that made that statement from the context of your letter of 25 November . . . [—] let the record show he is referring to a copy of his November 25th letter. A. It says "you state that if your job is abolished a whole lot of other people will lose their jobs, too."

"It's like a house of cards", and that is in quotes there also.

Q. * * * [A]ny others? **[85]** A. I think [that] is it. Well, one here stated that is misleading, he misled the public by * * * making seemingly honorable statement[s] that all I want is employment, that is labled as misleading in the letter. These are comments of other people. Here is one here at the top of page three, paragraph C: It states that "Marshall has lost its design and analysis capability and has become a contract-monitoring entity", and that "one of the basic problems here is the poor quality or absence of management" and I consider that false. * * * I think * * * the statement [that Marshall] has lost its design analysis capability and become a contract-monitoring entity is false.

Q. In its entirety or is it not true that Marshall is a contract-monitoring entity? That may not be all it is, but it is a contract-monitoring entity[?] A. My interpretation of that is in lieu of any design analysis that we have become an exclusive contract-monitoring entity and that would certainly be false. **[86]** Marshall has always been a contract . . . monitoring entity to a degree. The thing that I refer to specifically is Marshall has lost its design [and] analysis capability, and that is clearly, in my opinion false.

Q. The capability is here, in your judgment? A. Yes.

Q. And was then? A. Yes, sir.

Q. Now was it being employed? A. Yes, sir.

Q. In what? A. Well, it was being employed in several of our projects, most notable being in the design of the SRB, the structures of the SRB. It was being designed and the analysis of — and the design and analysis of LAGEOS of what we call the GPA, our gravitational . . . [Red] shift program and it was being, I would say, the analysis capability was being applied in virtually every program in which we are involved.

Q. Of course the analysis capability would be utilized in monitoring, wouldn't it? I mean, if there would have been no in-house designing there would be some analysis, of course, in monitoring, [w]ouldn't there?] **[87]** A. Could be.

Q. And * * * most of the LAGEOS design was done by Brown-Teledyne, wasn't it, or Teledyne-Brown? A. I don't know how the design was done.

Q. What about the SRB? A. Some was done by Teledyne-Brown on our support contract and some was done in-house.

Q. * * * With continuing reference to the ninth paragraph of your affidavit in its entirety, I want to ask you what was the purpose of this adverse action against Mr. Bush? A. Which adverse action?

Q. The one that you encapsulate there in the ninth paragraph of your affidavit? A. Of Mr. Kingsbury's proposal or as Center Director that I later considered the proposed adverse action?

Q. Yes, sir. What was the purpose of that adverse action as you understood it at the time you made your decision? A. The purpose was to — was a disciplinary or a **[88]** penalty for having made the false and misleading statements.

Q. The purpose was to discipline or punish Mr. Bush for having made false or misleading statements; is that correct? A. Yes, that is right.

Q. You didn't give any consideration to . . . [the] deterrent effect on other people if they happened to be like-minded? A. No, I did not consider that as an example.

Q. Just intrinsically, then, you didn't give any consideration to either . . . [its] impact upon the establishment here, so to speak, the institutional impact, let's put it that way? A. No, I am not — I am referring now to what the parts that I did here which was represented by my letter of November 25th.

* * * * * * *

[93] Q. Who made personnel policies for the Field Installations for NASA during 1974 and '75? A. Well, I made certain personnel policies as far as it affected the Center, within the guidelines that I received from Headquarters. And the Administrator makes the personnel policy for the whole agency within guidelines that are set down by the Civil Service Commission.

Q. Then you were subject to broad and overall guidance from the National Aeronautics and Space Administration in all that you did as Director of Marshall Space Flight Center? A. Yes, sir, on implementing a part of the NASA program.

Q. The reporter that you referred to in the seventh **[94]** paragraph of the affidavit, did he ask you anything about what [you] call the public allegations or the public allegations as far as the Plaintiff, other than the Plaintiff's statement that he didn't have meaningful work to do? A. No, sir. To the best of my recollection he asked me about three or four questions, and the first being are you familiar with the allegations that Mr. Bush has made to the effect that he doesn't have meaningful work to do. And, I said yes, I am familiar with those allegations, and then he said what is your response to that, what is your position on that matter, after which I gave the answer that I had had those statements investigated and on the basis of that information that I could say unequivocally that the statements or allega-

tions to the effect that he had no meaningful work to do had no basis ... [in] fact. And then as I recall he asked the question did that surprise you, that one of your people would say he had no meaningful work to do. And, I responded to the effect that yes, that does surprise me because in view of the hours and schedule that I worked, and in view of the schedules worked by most of the people immediately **[95]** around me who report directly to me, I am surprised. And then as I recall he asked the question, can you have his job abolished, I don't recall if he said can you or will you, but anyhow the substance was can you have his job abolished and I responded no, I could not, because it was necessary to the mission of the Center, and that is, to my recollection, the extent of the questions.

Q. And in what respect was his job necessary to the mission of the Center? A. Well, it was a part of the organization that we had, management had determined to be necessary to implement our mission.

Q. You determined that in advance of undertaking the operational implementation? A. I beg your pardon?

Q. You had made that determination in advance of actual operations, hadn't you? You had projected that that position would be necessary, isn't that correct? A. That is correct, we had.

Q. And you did not have before you any empirical data on actual operations as to whether or not he actually **[96]** had any work to do, though, did you? A. Did I?

Q. Yes, sir. A. I had been — I did not personally, my management people —

Q. That is all. A. People did.

Q. Then you had an active disbelief of Mr. Bush's statement about not having meaningful work, you actively disbelieved that

at the time you made the utterance, is that correct? A. On the basis of the information supplied to me I disbelieved that.

Q. Now, you make some reference in the sixth paragraph of your affidavit to a valid job description. Did anybody ever advise you, prior to the time you made the utterance, as to whether Mr. Bush had work that corresponded to that job description? A. Yes, sir. That was the way I understood it.

Q. Did anybody so advise you? A. Yes, Mr. Kingsbury did.

Q. Did he send the details, did he take out the job position and then look over there and say here I [97] want to collate these with the actual duties or actual tasks or anything substantially along those lines? A. He did not.

Q. Have you ever written any position descriptions for positions in the classified service? A. Ever?

Q. Yes, sir. A. Yes, sir.

Q. You have had some substantial experience in that? A. None recently but many years ago I had experience.

Q. Is it the practice that the man's immediate supervisor prepares the description record or drafts it and then sends it in to the classiciation, or what is the practice established, the practice with respect to the preparation of position record descriptions? A. Well, you know I can describe how it was done years ago when I did it and I am not confident whether that is the practice now or not.

Q. Well, how was it done when you did it? A. When I did it, the man's supervisor determined the elements of the job. And, he gained assistance from a personnel management expert in setting forth those duties in the proper language. Then that job [98] description was handed to another set of experts, the classification experts who graded the job and determined the

level at which it should be graded. That is — it may be out of date experience, but that is the best that I remember.

Q. Do you remember whether any of your subordinate managers, and I guess I am thinking we have pretty well narrowed that down to Mr. Kingsbury, ever reported to you that he or any of his subordinates had talked to Mr. Leonard Householder with respect to whether Mr. Bush had any actual duties? A. I don't remember anybody mentioning Mr. Householder.

Q. Do you know where Mr. Householder was working then, physically in terms of where Mr. Householder was working? A. No, sir.

Q. You didn't know that at the time you made the utterance? A. No, sir.

Q. So far as you know or can ascertain or could ascertain or did ascertain, did Mr. Kingsbury discuss the content of his 1 August letter with any persons other than you, before he sent it to Mr. Bush? **[99]** A. I don't know that.

Q. Do you have any judgment who would know other than Mr. Kingsbury? A. Mr. Kingsbury would know.

Q. But no other person that you know of? A. I couldn't testify that any other person that would know that.

Q. You can't testify to it? A. Because I simply don't know.

* * * * * * *

[100] Q. Have you ever seen any report of the General Accounting Office with respect to property management * * * here at Marshall Space Flight Center, during the fiscal year '75 or '74, either one? A. I have seen reports to the General Accounting **[101]** Office on numerous things and property management is one that I have seen a report on. I don't recall the specific date.

Q. Do you remember seeing one which indicated that between 1 June, '73 and 1 March, '74, capital items of an aggregate value not less than a million six hundred thousand dollars received at Marshall Space Flight Center [were] therafter treated as expendible materials rather than as a capital equipment? A. I don't recall specific, if I saw that report — I am aware that coming out of the Apollo Program there was a determination made [th]at some of the program — some of the property that had been considered expendible should have been capitalized. But I don't recall that specific report.

Q. But after the fact, determination instead of [treating it as] expendible, they should have capitalized it in effect? A. That is the way I recall it.

Q. Well, at the time that you made this utterance, you were aware, were you not Dr. Lucas, that the General Accounting Office had already reported, either tentatively or firmly, a conclusion that there were certain, at least alleged, irregularities and misconstructions in the course [102] of the application of governmental accounting practices here at George C. Marshall Space Flight Center? A. I don't recall that in relation to this utterance.

Q. What was it in relation to? A. I don't relate it to any time.

Q. Well, you do recall such a report? A. I recall such a report that had to do with the capitalization versus expendible considerations, and I don't recall the specific point. Did that come from the same report, I don't recall that.

Q. It is according to my information. A. I don't recall that specifically.

Q. You did not have it within your power in June of 1975 to dismiss Mr. Bush summarily, did you? A. I never considered that in 1975.

Q. Well, did you have it in your power? A. To what, what did you say, summarily?

Q. To summarily dismiss him for having made these statements? A. When you say summarily.

Q. Without a hearing? A. I wouldn't think so, no.

[103] Q. * * * Your position description that is attached to your motion, says in the second paragraph down in the summary section, * * * that you report to the NASA Associate Administrator for Center Operations who establishes specific accountability relationships. Please tell me on the basis of your experience in Government service and as incumbent of that position, just exactly what that phrase, ["] specific accountability relationship, ["] means to you? A. Well, that means that he determines those things that he would delegate to me, and on those things in which he would require reporting to himself.

Q. In other words, * * * whatever authority and responsibility you have as Director ... has been delegated to you from the Associate Administrator for Center Operations? A. Well, not specifically from the Associate Administrator for Center Operations. But, under the guidelines of the NASA management instructions, all of which he does not define.

Q. You are the recipient of a fairly broad delegation, is that correct? A. Yes.

[104] Q. And above you, the Associate Administrator for Center Operations is a recipient of even broader delegation; is that correct, [illegible] as far as you know? A. Yes, so far as I know.

Q. And above him, the Administrator of the NASA is the recipient of a delegation of even broader responsibilities for the Aeronautics and Space Program? A. So far as I known, yes, sir.

Q. Do you have a series of successive fairly broad delegations, then? A. Yes.

Q. And you in turn also make some broad delegations, is that correct? A. That is right.

Q. You do not have authority to initiate on your own, this investigation that you called the independent investigation, did you? A. I had to request that investigation because the man does not report to me.

Q. All right, sir. And that did — did that investigation or interim report of it form any basis of your denunciation of Mr. Bush's statement as having no basis in fact? **[105]** A. The interim report that I had received, as I think I have testified, together with the report I had received from Mr. Kingsbury, did establish in my mind the basis for this statement that I made.

Q. Was that interim report in writing? A. No, sir, it was orally given.

Q. ... [*Viva voce?*] A. Yes, sir.

Q. How long before you made the utterance? A. It was a matter of hours, I think it was within possibly two or three hours.

Q. Just coincidentally or did you check it out before in anticipation — A. Not by coincidence, I think I indicated earlier I had asked Mr. Potate prior to my going to the press conference, if — what is the status of the report from Dr. Olsen, in case I happen to be asked that question.

Q. Mr. Potate's duties keep him here most of the time? A. Yes, sir.

Q. All right. And he reported back to you within a matter of hours, is that right? **[106]** A. He reported to me immediately because it — he had just had a report from Dr. Olsen some short time before that, either that day or the previous afternoon.

Q. Just happened that way so far as you know? A. I don't know what basis, whether he called him or asked him or whether Mr. Olsen just dropped by and told him.

Q. He drop in and out occasionally? Olsen just drop in and out occasionally? A. I don't know.

Q. Olsen ever talk to you about this matter? A. Not to me directly.

Q. Olsen have anything to do with the draft, so far as you know, the drafting of this letter of August from Kingsbury to Bush? A. Not to my knowledge.

Q. Do you know anybody that might know whether he did or not, other than Olsen? A. I think Mr. Kingsbury would know.

Q. Anybody else? A. That is the only one I would know.

Q. How about Mr. Miniter, do you know him? A. No, I don't know if I have met Mr. Miniter or **[107]** not. I really — I may have met him on an occasion, but I don't think I would know him if he was to walk in the room.

Q. Do you know whether Dr. Olsen was consulted by anybody with respect either to the drafting of the accusing letter of August, the Notice of Proposed Removal, or the drafting of your notice of decision in November, the one that you read from this afternoon? A. I don't know. I had read his report but I did not discuss it with him and I don't know if anyone else —

Q. You got some of that letter out of the report, didn't you? A. I quoted some of the things that he found.

Q. Yes, sir. Do you know what distribution was made of that report? A. No, sir, I do not.

* * * * * * * *

Re-Examination:

[112] Q. Dr. Lucas, your appointment to this position did not require confirmation by the Senate, did it? A. No, sir, it did not.

Further the Deponents saith not.

* * * * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

[Title Omitted In Printing.]

PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

By way of supplement to his previously served and filed response to defendant's motion for summary judgment in the above-entitled action, the plaintiff herewith invites the court's consideration of the following statement and accompanying affidavits:

Statement

Since the motion docket of 23 September 1976, plaintiff has taken the deposition, upon oral examination, of the defendant. In response to inquiry by counsel for plaintiff, a docket clerk has advised that counsel that the court reporter filed the transcript of that deposition yesterday, 2 November 1976. As this is written, counsel for plaintiff has not yet received his copy of that transcript. Notwithstanding the lack of such copy, plaintiff does now call the court's attention to the following facts which counsel's notes indicate to be disclosed by that deposition:

(1) At all material times, the defendant has occupied a position which, though referred to as a "Public Law 313" position, is within the competitive service. There are twelve or so such positions at MSFC. At least some of those positions are "passed around" at intervals. [Although the dependent professed not to be aware of the change in terminology, such positions currently are called "5 U.S.C. 3104-type positions," no doubt to reflect the codification and amendment of the original statute under which certain scientific and professional positions were created *in* the civil service.]

(2) PL 313, or 5 U.S.C. 3104-type, positions in the space establishment functionally are research and development positions, because, as the witness opined, either NASA at large or MSFC has (or both have) a research and development mission.

(3) The appointment of one to such a position requires CSC approval.

(4) The defendant was not appointed to his position by the President of the United Statse. His appointment did not ... [require] confirmation by the United States Senate.

* * * * * * * *

(1) At as many different points in the course of his testimony, the defendant assigned three different times as the times at which he requested the "independent investigation" to which he refers in his affidavit. At one point, he testified that he requested the investigation "after the press conference." Later, after consulting with Mr. Frohsin, he indicated that by "press-conference" he referred to plaintiff's "press release" which was published on or about 15 May 1975.

(20) The General Accounting Office keeps an audit team more or less in residence at MSFC, and was doing so in June of 1975.

* * * * * * * *

(22) While admitting knowledge, as of June 25, 1975, of at least one personnel management survey at MSFC, the defendant equivocated with respect to the exact time of publication of the report entitled "An Evaluation of Personnel Management at the Marshall Space Flight Center, July 1975," the cover sheet of which he admitted to bear his signature. [A truncated version of that report appears as Exhibit E to the Plaintiff's Interim Response to Defendant's Motion for Summary Judgment. Counsel for the defendant said, during the course of the taking of the defendant's deposition, that the defendant would admit the authenticity of that exhibit, or words to that effect.]

(23) The defendant and his "subordinate managers" had a community of interest in seeing that the plaintiff was punished if the facts disclosed that the plaintiff deserved to be punished.

(24) The utterance which the defendant attributes to himself in the seventh paragraph of his affidavit, however, was something entirely separate and apart from the adverse personnel action taken against the plaintiff.

* * * * * * * *

(26) The defendant reports to NASA's Associate Administrator for Center Operations, who reports to the Administrator of NASA, who (as the defendant said) reports to the President of the United States.

(27) The prior incumbent in the position of Safety Director of MSFC was so situated that he would know, from personal observation, the nature and scope of the defendant's and the latter's predecessor's duties as Director of MSFC.

(28) That prior incumbent is Leslie W. Ball.

The affidavit of Dr. Leslie W. Ball is attached as Exhibit "G" to plaintiff's augmented response to defendant's motion for

summary judgment. It discloses that, according to the observations of an affiant as to whose qualifications the defendant had vouched, neither the defendant nor his two immediate predecessors have made much policy and, further, that the duties of the Director of MSFC, during the relevant period of time, have not included the voluntary making of pronouncements with respect to senior personnel management at MSFC. That affidavit further tends to show that, according to the observations and opinion of the affiant Ball, NASA Headquarters has kept the defendant pretty much in leading strings, especially since Mr. Groo became NASA's Associate Administrator for Center Operations. Finally, the affidavit of Dr. Ball corroborates the plaintiff's views of the unreliability of position records as guides to actual duties and responsibilities.

* * * * * * * *

/s/ Harvey Elrod
P.O. Box 632
Decatur, Alabama 35602
Attorney for Plaintiff

HUTSON, ELROD, EDWARDS & BELSER
Of Counsel

[Certificate of Service omitted in printing.]

[Title Omitted In Printing.]

AFFIDAVIT OF LESLIE W. BALL FOR USE IN OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said county in said state, this day personally appeared Leslie W. Ball, who, being first duly sworn, did depose and say as follows, namely:

"My name is Leslie W. Ball. I am sixty-four (64) years of age. I reside at 2007 Cliffmanor Circle, Huntsville, Alabama. I presently am employed with the National Aeronautics and Space Administration, at the George C. Marshall Space Flight Center. I have been employed at that facility since October, 1970.

"Between a day in March, 1971, and a day in March, 1975, I served as Director of Safety for the George C. Marshall Space Flight Center. In that capacity, I came daily into contact with the Director of the George C. Marshall Space Flight Center. My duties and office quarters were such that I had ample opportunity to observe the functions and activities of the Director.

"When I first became Director of Safety at the Marshall Space Flight Center, the incumbent Director of that field installation of NASA was Dr. Eberhard Rees. The defendant William R. Lucas became Director in, as I recall, June of 1974.

"Both during the incumbency of Drs. Rees and Petrone and the incumbency of the defendant, the functions and duties of the Director of the George C. Marshall Space Flight Center were limited, to my personal observation and positive knowledge, to the carrying out of policy decisions made at a higher level of the NASA hierarchy. During the period that the defendant was Director of the MSFC and I concurrently Safety Director of that facility, I had ample opportunity to observe what the defendant's real responsibilities were. They did not include the making of personnel policy or, except as authorized by NASA Headquarters, the making of pronouncements with respect to serious personnel management at MSFC. According to my consistent observations, the defendant was kept pretty much in

leading strings, so to speak, by NASA Headquarters. That was particularly true after Mr. Groo became Associate Administrator for Center Operations of NASA. Mr. Groo early made it clear to all of us who ate in the executive dining room that he would be calling the shots with respect to the formulation of policy for MSFC— as I am sure he did, also, with respect to other field centers of NASA.

"I speak without benefit, if that is the right word, of any inspection of the defendant's position record. It has been my personal experience and observation, while employed at MSFC, that there is not likely to be anything approaching congruency between position records and actual duties and responsibilities. Position records, by and large, are designed to conceal as much as they reveal."

Further, affiant saith not.

/s/ Leslie W. Ball
Affiant

Sworn to and subscribed before
me, this 1st day of November, 1976.

/s/ William H. Elrod, Jr.
Notary Public, State of Ala. at Large,
(My comm. exp. 2 Nov. 1976.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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[Title Omitted In Printing.]

COMES NOW the defendant in the above-styled cause and submits the attached affidavits of:

ELMER S. GROO
JAMES T. SHEPHERD, and
JOSEPH M. JONES,

in further support of his pending Motion for Summary Judgment.

WAYMAN G. SHERRER
United States Attorney

/s/ HENRY I. FROHSIN
Assistant United States
Attorney

[Certificate of Service omitted in printing.]

[Court & Title Omitted In Printing.]

AFFIDAVIT OF ELMER S. GROO FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Washington, D. C.)

Before the undersigned authority in and for Washington, D. C., this day personally appeared Elmer S. Groo who, being first duly sworn, did depose and say as follows:

I am now, and have been since September 4, 1974, the Associate Administrator for Center operations, National Aeronautics and Space Administration.

I have read and am familiar with the Plaintiff's complaint in this action and "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," which was filed on November 3, 1976, including the two affidavits attached to the latter.

Dr. James C. Fletcher, Administrator, National Aeronautics and Space Administration, announced the creation of the position of Associate Administrator for Center operations in a "Special Announcement" dated March 5, 1974 (copy attached). From that time until September 4, 1974, the effective date of my appointment, the position was filled by Dr. George M. Low, Deputy Administrator, on an "acting" basis.

As Associate Administrator for Center Operations, I am the "line official responsible for Agency-wide planning and direction of institutional resources and operational activities at the NASA field Centers." The following NASA offices report to me: The Directors of all NASA field installations; the Assistant Administrators for institutional management and personnel programs; and the Assistant Associate Administrator for system management. (See NASA Organization Chart approved March 29, 1976, copy attached). Thus I am responsible for institutional, personnel, and systems policies on an *agency-wide* basis, and not only for the various field centers.

Since appointment to my current position, I have made six visits to the Marshall Space Flight Center, the first one on September 23, 1974, just nineteen days after my appointment. The purpose of that visit was for me to be briefed about the functions and activities of the Center and to meet the Center's management officials. This is clearly evident from the agenda prepared by the Center (copy attached).

As indicated by the affiant Leslie W. Ball, I did have lunch with certain of the Center's management officials. However, his statement that I "made it clear" that I would be calling the shots with respect to the formulation of policy for MSFC" is completely erroneous. While I do not have a present recollection of everything that may have been said during that first visit, Dr. Ball's interpretation is totally implausible for at least two reasons: First, I never intended to operate—and have not

operated—in the manner implied by my alleged statement; and Second, even if I had intended to operate in such a manner, I would certainly not have made the announcement at an informal luncheon or in such a heavy-handed fashion.

The statement is also made by affiant Ball that the MSFC Center Director is "kept pretty much in leading strings" by NASA Headquarters, without authority to make Center personnel policy. In response to that, I need only summarize my view of the management relationship between the Center Director and me: I establish manpower targets and goals, and we jointly agree upon basic overall management guidelines. Within this framework, the Center Director is fully responsible—and has the correlative discretion and authority—for managing the Center's personnel policies and programs in accordance with the rules and regulations of the Civil Service System.

Further Deponent sayeth not.

/s/ Elmer S. Groo

Sworn to before me and subscribed in my presence this 23d day of November 1976.

/s/ Margaret F. Nelson
Notary Public
My commission expires
February 14, 1977

[Court & Title Omitted In Printing.]

AFFIDAVIT OF JAMES T. SHEPHERD FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said County in said State, this date personally appeared James T. Shepherd, who, being first duly sworn, did depose and say as follows:

I am now, and have been since January 1, 1974, the Director, Administration and Program Support, of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center. Administration and Program Support is one of the three major operating directorates of the Center. See Center Organization Chart dated October 1, 1976 (copy attached).

I have read and am familiar with the Plaintiff's complaint in this action and "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," filed on November 3, 1976, including the two affidavits attached to the latter.

As Director of Administration and Program Support, I attended most of the meetings held at the Center on the occasion of Mr. Elmer S. Groo's first visit in September of 1974, including his luncheons with the Center Director's executive staff. I do not have a present recollection of everything that was said at those meetings. Specifically, I do not recall any statement by Mr. Groo, or anything he said which could reasonably have been construed, to the effect that he "would be calling the shots with respect to the formulation of policy for MSFC." If Mr. Groo had made any such statement in my presence, I am certain that I would recall it. As a key management official of this Center, I would have been highly sensitive to *any* statement that

this Center's management prerogatives were to be reduced or withdrawn to NASA Headquarters.

At the time of Mr. Groos' initial visit, Leslie W. Ball was Director of the Center's Safety Office. In that capacity, he also attended the Center Director's staff luncheons.

I attended most of the meetings held here on the occasions of Mr. Groo's subsequent visits to the Center. These visits occurred on July 8, 1975, November 5, 1975, and June 1, 1976. Dr. Ball did not attend these subsequent meetings, including the Executive Staff luncheons. As a result of the reduction in force held at the Center during March 1975, Dr. Ball was displaced from his position by another qualified Government employee with greater retention rights under the Civil Service laws and regulations. Thus, Dr. Ball is no longer a member of the Director's Executive Staff. He has appealed this action once to the Civil Service Commission and has indicated that he may appeal further.

Further Deponent sayeth not.

/s/ JAMES T. SHEPHERD

Sworn to and subscribed before me this 24th day of November, 1976.

/s/ Dorothy J. Davis
Notary Public

[Title Omitted In Printing.]

AFFIDAVIT OF JOSEPH M. JONES FOR USE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF ALABAMA
MADISON COUNTY

Before the undersigned authority in and for said County in said State, this date personally appeared Joseph M. Jones who, being first duly sworn, did depose and say as follows:

I am now, and have been since November 12, 1973, the Director of the Public Affairs Office of the National Aeronautics and Space Administration's George C. Marshall Space Flight Center.

I have read and am familiar with the plaintiff's complaint in this action and the "Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment," filed on November 3, 1976, including the two affidavits attached thereto.

In my capacity as Director of Public Affairs, I arranged for the press conference which was held by Dr. Lucas on June 25, 1973, in the Center's Headquarters' building. I was present with Dr. Lucas throughout that press conference.

As stated by the Affiant Barry J. Casebolt, my office did retain copies of the press release which was handed out at the press conference (copy attached). The matter of William C. Bush's public allegations critical of the Center was not covered in that release. However, my office had received informal press inquiries on that matter, and I believed it likely that reporters would ask questions on the subject during the press conference. I discussed this likelihood with Dr. Lucas prior to the con-

ference but did not undertake to prepare anything on the subject or to include that item in the press release.

The TV interview of Dr. Lucas occurred immediately at the end of the formal press conference, in area adjoining Dr. Lucas' seated position at the head of the table. To my knowledge, no member of the press had left when this interview started; certainly a majority of them was present. I would say the interview commenced within half a minute of the "formal" press conference, while other reporters were chatting, gathering equipment, and making preparations for departure.

During Mr. Casebolt's tenure with *The Huntsville Times,* first as a reporter, and later as Science Editor, I had frequent contacts with him. However, Mr. Casebolt is no longer employed by the newspaper. Dr. Lucas, Mr. Potate and I have been accused of having in some manner engineered Mr. Casebolt's dismissal from *The Huntsville Times.* Attached is a copy of a letter dated August 13, 1976, from Senator Proxmire which reflects that allegation, as well as a denial on our behalf dated September 20, 1976, from Mr. James C. Fletcher, NASA Administrator.

Further Deponent sayeth not.

/s/ JOSEPH M. JONES

Sworn to and subscribed before me this 23rd day of November, 1976.

/s/ Dorothy J. Davis
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

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ORDER

For reasons set forth in the accompanying Memorandum of Opinion, the court concludes that defendant's motion for summary judgment is due to be granted. Accordingly, it is ORDERED, ADJUDGED and DECREED that, there being no genuine issues as to any material fact, summary judgment is hereby granted in favor of defendant William R. Lucas.

Costs to be taxed against plaintiff.

Done this the 4th day of February, 1977.

/s/ Sam C. Pointer, Jr.
United States District Judge

[Copy certification omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

[Title Omitted In Printing.]

NOTICE OF APPEAL

Notice is hereby given that William C. Bush, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order granting defendant's motion for summary judgment in this action, which said order was rendered on or about 4 February 1977 and apparently was entered on or about 7 February 1977.

This 7th day of March, 1977.

/s/ Harvey Elrod
P. O. Box 632
Decatur, Alabama 35602
(Tel. No. [205] 355-3731)
Attorney for plaintiff-appellant

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